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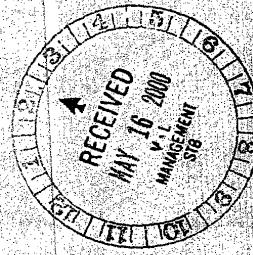
WRITER'S E-MAIL:

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BY HAND DELIVERY

Honorable Vernon L. Williams
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Ex Parte No. 582 (Sub-No. 1),
Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Joint Comments of Subscribing Coal Shippers. Also enclosed is a 3.5-inch diskette containing the text of the Joint Comments in WordPerfect format.

Please acknowledge receipt of the enclosed by stamping and returning to our messenger the enclosed duplicate of this letter.

Sincerely,

John H. LeSeur
An Attorney for Subscribing
Coal Shippers

JHL:mfw
Enclosures

cc: Parties of Record

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Office of the Secretary

BEFORE THE
SURFACE TRANSPORTATION BOARD

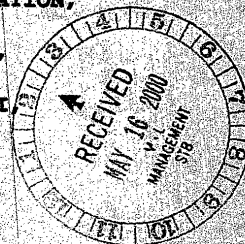
MAY 16 2000

Part of
Public Record

MAJOR RAIL CONSOLIDATION
PROCEDURES

Ex Parte No. 582 (Sub-No. 1)

JOINT COMMENTS OF SUBSCRIBING COAL SHIPPERS:
WESTERN COAL TRAFFIC LEAGUE,
AMERICAN PUBLIC POWER ASSOCIATION,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
ALLIANT ENERGY CORPORATION,
CENTRAL AND SOUTH WEST SERVICES, INC.,
CITY OF GRAND ISLAND, NEBRASKA,
CITY UTILITIES OF SPRINGFIELD, MISSOURI,
LAFAYETTE UTILITIES SYSTEM,
NORTHERN STATES POWER COMPANY,
PLATTE RIVER POWER AUTHORITY,
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT and
TEXAS MUNICIPAL POWER AGENCY



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Dated: May 16, 2000

Counsel for Subscribing
Coal Shippers

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BEFORE THE
SURFACE TRANSPORTATION BOARD

MAJOR RAIL CONSOLIDATION
PROCEDURES

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PREFACE AND SUMMARY

Subscribing Coal Shippers ("Coal Shippers") present these comments in response to the Surface Transportation Board's ("STB" or "Board") Advance Notice of Proposed Rulemaking ("Advance Notice") served in this docket on March 31, 2000. Coal Shippers represent a broad cross-section of utility coal shippers, including investor-owned, municipal, public and rural electric cooperative electric power providers.

Coal Shippers propose that the Board amend its current merger rules by adopting rules that require merging carriers to

make shippers financially whole for merger-caused service disruptions; require merging carriers to open their rail lines to increased rail competition; and prevent merging carriers from passing through to shippers cost increases the carriers sustain as a result of merger-caused service disruptions or as a result of asset write-ups caused by acquisition premium payments.

Parts II and III of these Comments (and accompanying attachments) explain the bases for the proposed rules. Part IV (and accompanying attachments) provides specific write-ups of each proposal in rule language format. Part V addresses other merger policy changes requested by Coal Shippers.

I.

IDENTITY AND INTEREST

Coal Shippers consist of three national associations and nine individual power providers who purchase and pay for the rail transportation of coal for use as an electric generation fuel source. Because their positions are complementary, and in the interest of economy and avoiding duplication in their comments, these parties have joined together in these Comments.¹ The Coal Shippers are as follows:

¹ Several of the individual utilities joining in these Comments have submitted separate Comments in their own name in order to provide the Board with specific information concerning their own experiences pertaining to issues raised in the Advance Notice.

Western Coal Traffic League is a voluntary organization, whose membership consists of utility shippers who ship and receive in excess of 100 million tons of coal mined west of the Mississippi River that is transported by rail.

American Public Power Association is the national service organization representing the interests of the Nation's 2000 publicly owned, locally controlled electric utilities, providing electric service to nearly 40 million Americans.

National Rural Electric Cooperative Association is a national service organization representing more than 900 not-for-profit, consumer-owned private electric systems that provide electric service to 34 million people in 46 states.

Alliant Energy Corporation is an investor-owned public utility holding company headquartered in Madison, Wisconsin, whose operating subsidiaries provide electric service to more than one million customers in a 54,000 square-mile service territory in Wisconsin, Iowa, Illinois, and Minnesota.

Central and South West Services, Inc. is a management and professional services affiliate of Central and South West Corporation, an investor-owned public utility holding company with four operating subsidiaries serving 1.8 million customers in Texas, Oklahoma, Louisiana, and Arkansas.

City of Grand Island, Nebraska generates and distributes electricity to 22,000 homes, businesses, and

industries in and around the City, through the Grand Island Utilities Department, a financially self-supporting function of the City.

City Utilities of Springfield, Missouri is a municipal utility that is responsible for the generation, transmission, and distribution of electric power and the provision of other utility services for retail customers in and around Springfield, Missouri.

Lafayette Utilities System is a community-owned and operated utility responsible for the generation, transmission, and distribution of electric power and the provision of other utility services for customers in and around Lafayette, Louisiana.

Northern States Power Company is a publicly-held company that is engaged, together with its wholly owned subsidiary, in the generation, transmission, and distribution of electricity to approximately 1.4 million customers in Minnesota, Wisconsin, North Dakota, South Dakota, and Michigan.

Platte River Power Authority, a political subdivision and public corporation of the State of Colorado, is a wholesale electric utility provider for the owner cities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado, and for other utilities and businesses in the western United States.

Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, is an agricultural improvement and power district that provides electricity to power users in a 2,900 square-mile service area in Arizona that includes the Phoenix metropolitan area.

Texas Municipal Power Agency is a Texas municipal agency whose business is the generation and transmission of wholesale electric power to the Member Cities of Bryan, Denton, Garland, and Greenville, Texas.

II.

OVERVIEW

In determining an appropriate policy for railroad consolidations and whether and what changes are warranted, it is important to examine the current state of the railroad industry and consider how it has been changed by past merger policy.

In that regard, it is clear that whatever the difficulties faced by the railroad industry in the 1970s, the twenty years that have passed since the Staggers Rail Act of 1980 has become law have given the industry more than ample opportunity to correct them. Indeed, as of 1995, the industry appeared to be in outstanding condition. Capital shortages and excess capacity had been largely overcome, and tremendous productivity improvements had been achieved, as reflected, for

example, in the annual productivity calculations for Rail Cost Adjustment Factor ("RCAF") purposes.

Since that time, the Class I railroads have engaged in a series of mergers that have been, for the most part, disastrous for their customers and themselves. The carriers have been unable to maintain adequate service as their systems have become clogged. The congestion has substantially increased the cost of service for those goods the carriers have been able to move. The increase in the cost of service has been exacerbated by the write-up of the book value of the assets that the carriers acquired through their consolidations. Reduction of congestion has entailed increased capital and operating expenses, creating pressures for higher rates. Productivity has plummeted, accompanied by entirely understandable decreases in the railroads' equity value as reflected in their stock prices.

Consolidating railroads have routinely represented in their merger applications that service disruptions would be avoided and there would be ample savings and benefits for all as a result of increased efficiencies, particularly through additional single-line service and the elimination of cumbersome interchanges. However, they have, with rare exception, completely failed to deliver on those claims and representations as moderate to severe service disruptions have ensued. Regrettably, much of the cost and other burden has fallen on

shippers, particularly captive shippers, who have received poor and/or inadequate service based on inflated costs.

The railroads have no one but themselves to blame for their troubles. The representatives of the investment community that appeared at the Board's hearing in Ex Parte No. 582, Public Views on Major Rail Consolidations, made clear that the railroad industry had experienced no significant difficulty in attracting capital in recent years, even when seeking additional capital to overcome a service crisis. Indeed, the railroad industry appears to have an advantage over many other businesses in raising capital. General economic conditions have also been extremely favorable in terms of low inflation, low fuel prices (until recently), and the record economic expansion.

Unfortunately, the railroads have squandered their golden opportunity by using the abundantly available capital to pursue mergers that they could not manage effectively. Capital (both financial and intellectual) that could and should have gone to maintaining and expanding infrastructure and service has instead been diverted to paying merger premiums and employee buyouts. Productivity growth has plummeted, so much so that there is now a significant prospect that the RCAF productivity adjustment could turn negative.

Events have also demonstrated that the STB has a very limited ability to remedy these problems once they emerge. The

STB's emergency service order in the wake of the UP/SP meltdown may have provided some benefit, but shippers and the general economy still suffered enormously, and most shippers had no viable means for obtaining recourse for their losses.

The time has now come for the STB to adopt a new approach to mergers. The industry needs competition, not protection, in order to provide shippers with better service. Competition will induce the railroads to deliver improved service efficiently, which is the key to the industry's recovery and future growth. Mergers may provide an opportunity to enhance competitive rail service, but only if the STB engages in a pro-active and pro-competitive role. Recent events demonstrate all too clearly that the railroad industry, left to its own devices, will not maximize the public interest, or even its own interests. Only by maximizing competition can service be improved and efficient operation rewarded.

Against this framework, Coal Shippers explain their specific concerns and positions (Part III, below) and propose specific new merger rules for the STB's consideration (Part IV, below).

III.

COAL SHIPPERS' POSITIONS

A. SERVICE ISSUES

Many members of the Coal Shippers' coalition have actively participated in Interstate Commerce Commission ("ICC") and STB merger proceedings. In these cases, Coal Shippers presented substantial evidence that proposed rail mergers would cause substantial service disruptions, which disruptions did subsequently occur.

Coal Shippers have suffered greatly as a consequence of merger-caused service problems. This suffering is fully documented in the Ex Parte No. 582 proceedings, as well as prior STB and ICC dockets. We will not repeat the record here, but append, as Attachment A hereto, select testimony from prior cases that illustrate the depth of these problems as applied to particular coal shippers.

By way of brief summary, merger service problems have led to slowdowns and gridlock in coal transportation service. This gridlock is devastating for utility coal shippers who need a constant supply of coal in order to run their coal-fired electric generating facilities. When this coal does not arrive (and coal stockpiles dwindle), utilities' choices usually consist of the following:

1. Find alternative transportation carriers or modes;

2. Find alternative electricity sources; or
3. Curtail service.

Choice 3 is the choice of last resort as its means customers do not receive electric service -- a disastrous result. Choice 1 is fine in theory, but in most cases, not in practice. Rail is the dominant means of transporting utilities' coal and, in most instances, utilities cannot physically substitute either a different rail carrier or any other transportation mode. Most utility power plants are captive to a single rail carrier (either at origin or destination, or both). Even in situations where a coal shipper can substitute second rail carrier service, that service may not be available, or available only at an extremely high price.

The UP/SP service meltdown illustrates the problems with Choice 1. When the UP/SP meltdown occurred, many western coal shippers tried to substitute BNSF service. However, BNSF itself lacked the capacity to take on more than a small portion of the increased demand and, even then, was generally reluctant to do so in the absence of premium prices, long-term commitments, etc.

Thus, as a practical matter, Choice 2 (alternate electricity supply) must be invoked. This choice invariably results in the utility incurring huge cost penalties (e.g., the

difference between the cost of coal-fired generation and substitute generation or purchased power costs).

The STB has candidly acknowledged that mergers have created "substantial adverse impacts" for many shippers:

[S]ervice disruptions have accompanied the implementation of recent large mergers, and many shippers have experienced substantial adverse impacts in connection with the last round of mergers, beginning with the combination of the BN and SF systems, proceeding with the UP acquisition of the Southern Pacific (SP) system, and ending with the acquisition and division of Conrail by CSX and NS. The overwhelming testimony at our hearing indicated that the shipping public has still not recovered from those disruptions.

Decision served March 17, 2000 in Ex Parte No. 582 at 4 (footnote omitted).

Coal Shippers propose that the STB amend its merger rules by requiring merging carriers to make shippers financially whole for merger-caused service problems. A draft proposed rule setting forth that relief is set forth in Part IV, below.

B. COMPETITION ISSUES

Many members of the Coal Shippers coalition have also actively participated in many prior ICC and STB proceedings involving competition issues. As is the case with service issues, we will not repeat here all of the materials that Coal Shippers have submitted in prior cases, but do append, as

Attachment B hereto, excerpts from prior submissions that illustrate the Coal Shippers' concerns and frustrations with merger-generated concentration of market power and the current lack of competition in the railroad industry.

Any new rail mergers (which will create even more concentration in the rail industry) must come with quid pro quo relief -- increased competitive options for rail shippers. This quid pro quo should include the following:

- allowing captive rail shippers or captive coal mines access to an additional rail carrier;
- allowing captive rail shippers or captive coal mines meaningful bottleneck rate relief;
- eliminating "paper barriers" that prevent shortline railroads from providing competitive rail service.

Each of the above-referenced proposals has a long regulatory history at the ICC/STB. However, now is the time to revisit that history and adopt these proposals in light of the impending threat of a national rail duopoly. There is a "very real prospect that the rail industry is on the threshold of making another round of rail merger proposals that, if approved, could result in a transcontinental rail duopoly." Advance Notice at 4. The specter of a national "rail duopoly" mandates that the STB -- if it is going to allow such a duopoly to take place -- take actions to "affirmatively enhance[] . . . competition." Id.

In today's environment -- with the industry far more concentrated than it was when our current regulations were fashioned; with the prospect that any further major rail merger would trigger strategic responses that could lead to a transcontinental rail duopoly; and with only limited opportunities remaining for significant merger-related efficiency gains -- the time has come for us to consider whether we should revise our rail merger policy, as many have suggested, with an eye towards affirmatively enhancing, rather than simply preserving, competition.

Id.

Each of the Coal Shippers' proposals should increase competition. Allowing second carrier service should increase a captive shipper's service options from one to two. Bottleneck relief affords a shipper the benefits of competition over the non-bottleneck portion of the origin-to-destination movement.² Paper barrier relief should open up at least portions of origin-to-destination movements to competition. Proposed rules incorporating these proposals are set forth in Part IV, below.

² In its Advance Notice, the Board indicates it will consider amending its Bottleneck rules by requiring merger applicants to offer, on request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment. As described in the separate comments of two of the Coal Shippers, Alliant Energy Corporation and Central and South West Services, Inc., this proposal does not remedy the "contract first" problem. The Coal Shippers' experience with Powder River Basin coal movements is that the competitive-segment carrier will not offer a competitive contract proposal "on the come." The only way to make bottleneck relief work is to permit the shipper to obtain (and litigate, if necessary) a bottleneck rate first, before it negotiates a contract with a competitive-segment carrier.

Coal Shippers also strongly disagree with the railroad industry's lament that any pro-competitive relief will financially devastate the industry. In fact, experience has shown that increases in competition in the rail industry, in the limited areas where it has occurred (e.g., the ICC's actions forcing some origin competition in the Wyoming Powder River Basin) have greatly increased the industry's financial bottom line. See Attachment C.

C. REGULATORY COSTING ISSUES

Coal Shippers request that the STB condition any future mergers with stipulations that merger premiums, and service failure costs, not be included in the regulatory cost base used for maximum rate cases or in calculating the STB's RCAF indices. Shippers simply should not be required to shoulder the costs associated with merger-related service failures and premium prices paid for rail acquisitions. See Attachment D. Proposed rules incorporating these stipulations are set forth in Part IV, below.

IV.

COAL SHIPPERS' PROPOSALS

A. SERVICE PROPOSAL

Coal Shippers request the Board to amend its merger rules by adopting the following rule:

The Board will impose as a condition on any major rail consolidation transaction a requirement that the consolidated carrier(s) make any shipper financially whole for any injuries the shipper incurs as a result of post-consolidation service problems. The shipper may submit a claim to a carrier for compensation under this regulation at any time following the Board's approval of the consolidation. The consolidated carrier shall pay the claim within fourteen (14) days of its receipt of the shipper's claim; provided, however, if the carrier disputes the claim, it shall so notify the claimant in writing and explain therein, with specificity, the basis for its dispute, within fourteen (14) days of its receipt of the shipper's claim. If the consolidated carrier so disputes a shipper's claim, the shipper may institute a proceeding at the Board to obtain payment. The Board shall complete any proceeding under this rule within one hundred eighty (180) days after the filing of the request for relief. A consolidated carrier may not raise as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

This rule is intended to insure prompt resolution of service disruptions and to provide a remedy for shippers who suffer financial injury as a result of poor post-consolidation

railroad service. The rule allows the parties to negotiate accords, subject to STB intervention in the event the parties are unable to negotiate payment terms. The rule is made applicable to mergers occurring on or after January 1, 1996 because, as the Board acknowledges, recent mergers, despite carrier representations to the contrary, have caused substantial disruptions to the shipping public, which disruptions are ongoing. See March 17 Decision in Ex Parte No. 582 at 4. Shippers negatively impacted by the recent mergers should be able to obtain prompt recourse from the merging carriers.

B. COMPETITION PROPOSALS

1. Access Relief

Coal Shippers request the Board to amend its merger rules by adopting the following access relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following access relief:

(a) Following the Board's approval of a major rail consolidation transaction, any person, including an affected shipper, may request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service. The carrier shall have ninety (90) days to respond to the request. If the carrier denies the request, the person may seek relief from the Board as provided in subsection (b) below.

(b) Upon request of any person, including an affected shipper, and subject to

the requirements of subsection (a), the Board shall require railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. The Board shall establish compensation for the use of the facilities on a usage basis based upon a sharing of the total costs incurred. Total costs shall include roadway maintenance expenses, dispatching expenses, and return on and of net book investment on road property. The rail carriers are responsible for establishing the conditions for use of the facilities, except compensation. However, if the rail carriers cannot agree, the Board shall establish conditions for use of the facilities. The compensation shall be adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

(c) A rail carrier whose railroad facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier for injuries sustained as the result of compliance with the requirement or for compensation for the use, or both as appropriate, in a civil action, if it is not satisfied with the conditions for use of the facilities or if the amount of the compensation is not paid promptly.

(d) The Board shall complete any proceeding under subsection (b) within 180 days after the filing of the request for relief.

The proposed access rule is intended to promote effective rail competition by giving shippers the opportunity to obtain competitive access relief from the consolidated carrier in those instances where access relief is physically practicable.

The rule is also intended to promote shipper/carrier negotiated access solutions, subject to STB intervention in those instances where the parties are unable to work out the terms of the relief via negotiations.

2. Bottleneck Relief

Coal Shippers request the Board to amend its merger rules by adopting the following bottleneck relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following bottleneck rate relief:

(a) Following the Board's approval of a major rail consolidation transaction, upon the request of a shipper, the consolidated rail carrier(s) shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged. A carrier shall establish a rate and provide service upon such request without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement; provided, however, that if such a contract exists, the rate established by the carrier shall not apply to transportation covered by the contract.

(b) A shipper may challenge the reasonableness of any rate established by a consolidated rail carrier in accordance with subsection (a). The Board shall determine the reasonableness of the rate so challenged without regard to: (i) whether the rate

established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with a rail carrier for any part of the rail traffic at issue, provided that the rate prescribed by the Board shall not apply to transportation covered by such a contract.

The proposed bottleneck relief rule is intended to promote competition by requiring consolidated carriers to provide transportation rates over bottleneck route segments. If a rate so provided is unreasonably high, a shipper can seek maximum rate relief from the STB.

3. Paper Barrier Relief

Coal Shippers request the Board to amend its merger rules by adopting the following paper barrier relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following paper barrier relief:

(a) "Paper barriers," as used in this section, refer to the terms in agreements between (i) Class I railroads and (ii) Class II or Class III railroads ("shortlines") or non-carriers which impair or penalize the shortline's freedom to interchange traffic with carriers with which the shortline can physically connect.

(b) Following the Board's approval of a major rail consolidation transaction, any person (including an affected shipper) may request the consolidated carrier to remove one or more paper barriers. The carrier shall respond within thirty (30) days after receipt of the request. If the carrier does

not grant the request, a person may institute proceedings at the Board.

(c) Upon receipt of a request, and subject to the provisions of subsection (b), the Board shall direct the consolidated carrier to remove a paper barrier unless the carrier can demonstrate that retention of the paper barrier is in the public interest. In making a public interest finding, the Board will be guided by the principles set forth in subsection (d).

(d) Paper barriers to interchange are inherently anti-competitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit. There is a rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than five (5) years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a shortline that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. For purposes of this section, "fair market value" shall be computed without considering the revenues earned by the carrier for handling traffic originating or terminating on those properties over other parts of its system.

The proposed paper barrier rule is intended to eliminate restrictions that prevent shortline railroads from providing competitive interchanges with major rail carriers. The rule allows shippers and carriers to first negotiate removal of

unreasonable paper barriers, subject to Board resolution of disputes the parties are unable to successfully negotiate.

C. REGULATORY COST PROPOSAL

Coal Shippers request the Board to amend its merger rules by adopting the following regulatory cost relief rule:

The Board shall impose as a condition on any major rail consolidation transaction the following regulatory cost relief:

(a) In any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for a carrier's assets, shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems. "Purchase premium," as used in this paragraph, refers to the difference between the net book value and the purchase price of the involved rail properties. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

Coal Shippers' proposed regulatory cost relief rule is intended to prevent a consolidated carrier from passing through increased costs in the form of service disruption costs, and purchase premiums, to shippers via the inclusion of these costs in the Board's General Purpose Costing Systems (e.g., the Uniform Railroad Costing System) and in its calculation of the RCAF.

Coal Shippers also agree with Vice Chairman Burkes' recent observation "that it may be time to review the treatment

of these charges in regulatory proceedings." Western Coal Traffic League v. Union Pacific R.R., Finance Docket No. 33726 (STB Decision served May 12, 2000) at sheet 13. The instant proceeding provides the Board with the opportunity to revisit acquisition premium and special charge issues the Board has addressed in prior decisions.

D. CONFORMING PROPOSALS

Coal Shippers append as Attachment E proposed revisions to the Board's merger rules (49 C.F.R. § 1180) that incorporate the above-referenced proposed rules, as well as other proposed and conforming changes.

V.

OTHER ISSUES

Coal Shippers support the Board's proposal to consider downstream "effects of a proposed transaction, including the likely strategic responses to that transaction by non-applicant railroads." Advance Notice at 5. Consideration of such effects is particularly important in light of the national rail duopoly threat hanging over the rail industry.

Coal Shippers also support an approach whereby the STB looks at "3 to 2" issues, and one-lump issues, on a case-by-case basis, without application of any presumptions that work to the

disfavor of shippers seeking relief in cases raising these issues. Instead, the merits of each situation should be carefully reviewed based upon the facts presented and the relief requested.

CONCLUSION

For the reasons set forth herein, Coal Shippers request that the Board adopt and promulgate the proposed rules and policies discussed above.

Respectfully submitted,

William L. Slover *John C. LeSeur*
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Dated: May 16, 2000

Counsel for Subscribing
Coal Shippers

INDEX OF ATTACHMENTS

Attachment

Tab

Western Coal Traffic League Statements
in Ex Parte No. 573, Rail Service in
the Western United States (Filed
Oct. 27, 1997, December 1, 1997 and
February 26, 1998)

A

Western Coal Traffic League Comments
in Ex Parte No. 575, Review of Rail
Access and Competition Issues (Filed
March 26, 1998) (without attachments)

B

Statement of Thomas D. Crowley on
Behalf of Western Coal Traffic
League, Hearing on the Condition of
the Railroad Industry, Before the
House Committee on Transportation and
Infrastructure, Subcommittee on
Railroads (Dated April 22, 1998)

C

Opening Statement of Fact and Argument
of Complainant Western Coal Traffic
League, Testimony of Daniel J. Kuehn
in F.D. No. 33726, Western Coal Traffic
League v. Union Pacific Railroad Company
(Filed May 5, 1999)

D

Coal Shippers' Proposed Changes to the
Board's Merger Regulations (49 C.F.R. § 1180)

E

ATTACHMENT A

STAMP & RETURN

STATEMENT OF
THE WESTERN COAL TRAFFIC LEAGUE
BEFORE THE SURFACE TRANSPORTATION BOARD
EX PARTE NO. 573, RAIL SERVICE IN THE
WESTERN UNITED STATES
PUBLIC HEARING -- OCTOBER 27, 1997

Madam Chairman, Board Member Owen:

The Western Coal Traffic League ("WCTL") appreciates the opportunity to appear before the Board to testify on the very serious issue of rail service problems in the western United States.

We are Daniel G. Kuehn and Mark Werner, and we are executives with the Lower Colorado River Authority ("LCRA") of Austin, Texas and the City Public Service Board ("CPSB") of San Antonio, Texas. We also both serve on the Board of the Western Coal Traffic League ("WCTL"), a voluntary association comprised of electric utilities who purchase approximately 95 million tons of coal annually from mines in the western United States, and who pay for the rail transportation of that coal from the mines to utility generating stations. We are appearing jointly before the Board to discuss western railroad freight service problems experienced by WCTL members and to suggest actions that the Board should undertake to improve western railroad service.

I.

INTEREST OF WCTL

Since its inception in 1976, WCTL¹ has participated in proceedings before the STB (and the former ICC) and the courts on numerous issues involving railroad coal transportation. More specifically, along with the recent UP/SP consolidation proceeding, WCTL and/or its members have participated as a party in many of the recent major western railroad consolidation proceedings, including Burlington Northern/Santa Fe (Finance Docket No. 32760) (1996) and Union Pacific/MKT Railroad (Finance Docket No. 30800) (1988).

WCTL is interested in this proceeding because our members rely on UP and BN/SF for their coal transportation movements (UP/SP and BN/SF together control 96 percent of western coal traffic). Even those members who do not specifically rely on UP for service have been impacted by the UP's operational problems. UP moves more than 130 million tons of coal annually - much of which is transported under contract to WCTL members. The maintenance of reliable and efficient transportation service is essential to preserving an adequate coal supply; without an adequate supply of fuel, the reliability of electric utility systems are put in great jeopardy.

¹ WCTL member companies are listed on the attached Appendix 1.

II.

WCTL COMMENTS

A. Introduction

Through this proceeding, the Board has invited comments on the status of rail service in the western United States and proposals for solving current service problems. WCTL is extremely concerned about the deterioration in UP service and the resulting impacts on BN/SF service. WCTL members are incurring millions of dollars in added costs each day as a result of deficient railroad service, and the UP's failure to live up to its contractual obligations and commitments. These increases in costs are primarily the result of higher prices paid by WCTL members for fuels used to replace the coals not being delivered by UP.

It is important to emphasize at the outset that WCTL member companies have utilized UP rail freight service for many years. By and large, in the past our members have found UP to be an efficient transporter of coal. As such, WCTL does not view the current UP solution as chronic. We believe that the fact that UP has been an efficient transporter of western coal for many years is an important factor in the Board's consideration of how to solve the carrier's current problems.

B. The Current Crisis is the Inevitable Consequence
of the Board's Expedited Actions in the UP/SP Merger

Prior to discussing current UP service problems, it is important that we review how the present situation has come about. As mentioned above, WCTL participated as a party of record in both the BN/SP and the UP/SP merger cases. WCTL steadfastly opposed these consolidations.² Our specific reasons for opposing the UP/SP merger were two-fold. First, WCTL asserted that the combination of UP and SP would harm geographic competition between SP origin coals and UP origin coals and that allowing further concentration in the market for western coal transportation would lead to duopoly pricing. Second, WCTL argued that the UP/SP merger would cause severe service and operating problems.

WCTL's comments submitted to the Board in the UP/SP consolidation proceeding included a detailed discussion of potential service problems related to the Applicants' proposal. For example, the Verified Statement of WCTL witness Mr. William C. Lyman concluded as follows:

I conclude that if the UP/SP merger is effected in the manner planned, coal shippers who depend upon service via the central corridor will see the quality of that service deteriorate, particularly with respect to unit train cycle times.

Comments of the Western Coal Traffic League on the Proposed UP/SP

² WCTL is one of the few parties who have challenged the Board's UP/SP consolidation decision. The case is currently on appeal before the District of Columbia Circuit, (D.C. Circuit Docket No. 96-1373).

Merger, (March 29, 1996), Finance Docket No. 32760, Verified Statement of William C. Lyman, at 4.

After reviewing the Applicants' operations plans for individual line segments, and expressing grave doubt about the ability of UP to handle projected additional traffic volumes, Mr. Lyman discussed the serious problems that UP would experience in integrating SP into its system; much like the lingering service problems that UP experienced after its merger with C&NW.

Given the admitted difficulties experienced by UP only last year in its absorption of the C&NW Railway, I believe that it is naive to make operating assumptions for a merged UP/SP that do not anticipate any significant assimilation inefficiencies.

It is, of course, well-known that UP has had great difficulty in absorbing the C&NW into its operations. . . . UP/SP forecasts post-merger locomotive surpluses, but this certainly was not the reality in the wake of the UP/C&NW merger. UP/C&NW was an end-to-end type merger which everyone, including UP, thought would be a simple event, particularly with respect to PRB coal movements which C&NW and UP had interlined together for over a decade. The UP/SP merger would be a much more complex event because routes are parallel and intertwined and SP is much larger than C&NW was.

UP/SP, on the other hand, interchange with each other at 16 locations and have numerous parallel routes, making it, at best, a complex merger to accomplish. Given SP's service problems and UP's lingering service problems and equipment shortages (customers are still complaining in March, 1996), the UP/SP merger will be a much greater challenge to management than was the C&NW merger.

* * *

To summarize, the "real world" operating

conditions that the Applicants are likely to encounter as they attempt both to consummate their merger and proceed to serve the shipping public will be quite different from those upon which their Operating Plan is based.

Id. at 13-15.

In addition to Mr. Lyman, WCTL's expert witness Mr. David G. Weishaar also predicted that the UP/SP transaction would lead to severe service problems, and in particular, would result in major service disruptions for coal shippers. Mr. Weishaar warned the Board as follows:

While UP has stated that it has learned from its mistakes and its haste in attempting to assimilate the CNW, and that it will not repeat those mistakes in integrating SP's operations into its system, coal customers are understandably skeptical of such statements in view of UP's recent track record.

SP is much larger than CNW was in terms of mileage, traffic volume, and commodity mix, and the Operating Plan for the merged system indicates that numerous changes are contemplated with respect to the routing and manner of operation of many different kinds of traffic, including coal, intermodal, automotive and manifest traffic.

With respect to coal traffic alone, midwestern customers will see many changes as a result of the proposed rerouting of SP-originated coal trains. UP proposes to abandon SP's principal eastbound route for Colorado/Utah coal traffic -- its line from near Dotsero, Co to Pueblo via Tennessee Pass and major segments of the line between Pueblo and Herington, KS -- and will reroute much of this coal traffic via Denver and Cheyenne, WY, where this traffic will add to the congestion on UP's busiest main-line corridor (Cheyenne-North Platte-Omaha/Council Bluffs-Chicago) as well as at UP's Bailey Yard at North Platte, NE, which is the hub of its

system and through which almost all of UP's SPRB coal traffic must pass.

The rerouting of coal and other traffic as a result of the merger, combined with universally projected increases in coal traffic (particularly from the SPRB) that are likely to continue to occur in the future, will further exacerbate UP's current service problems to the detriment of midwestern coal shippers.

Id., Verified Statement of David G. Weishaar, at 27-28 (footnotes omitted).

Unfortunately, WCTL's predictions of severe service disruptions were ignored in their entirety by the Board which accepted UP's rosy version of post-merger service efficiencies, improved cycle times, increased equipment, etc. WCTL takes no pride in being "right" on this issue. The situation today stands in stark contrast to the operational and service efficiencies that UP promised to its customers, the Board, and the public at the time of its acquisition of SP. While it is too late to prevent the breakdown of UP/SP, the Board must be mindful, in future mergers, to heed the reasoned warning and concerns of those who oppose railroad mergers and to give careful and deliberate consideration to their views.

C. Present Coal Transportation Problems

A review of the present coal transportation problems being faced by the Lower Colorado River Authority and the City of Austin ("LCRA/Austin"), joint owners of the Fayette Power Project ("FPP"), is representative of the problems faced by WCTL members who utilize UP. Other WCTL members who utilize UP/SP include

City Public Service Board of San Antonio, Arizona Electric Power Cooperative, Houston Lighting & Power, Central and South West Services, and MidAmerican Energy.

LCRA provides wholesale electricity to 11 electric cooperatives and 33 municipalities in Central Texas; these customers in turn serve approximately one million consumers. The FPP, located near La Grange, Texas, burns approximately 6.5 million tons of coal annually originating in the PRB of Wyoming and transported by UP. FPP owns a railcar fleet of 1,360 cars, which the railroad configures into ten or eleven unit trainsets. Each trainset normally takes about one week to complete the 3,000 mile roundtrip from the PRB.

FPP normally maintains a 50 to 60 day supply of coal in its coal stockpile. Unfortunately, because of the UP's deficient service, UP has delivered to the FPP approximately 750,000 fewer tons than requested this year under the UP/LCRA rail transportation contract. The result is that both FPP partners, the City of Austin and LCRA have been required to curtail their coal burns at FPP due to the low stockpile of coal inventory on hand. In the absence of such curtailments, the stockpile would be exhausted, or very close to exhausted today. The additional cost to the City of Austin and LCRA for generation of power with more expensive substitute fuels and for purchased power is approximately \$8 million to date. For each trainload of coal that must be offset with non-coal fired generation or power purchases, the additional cost ranges from approximately \$400,000

to over \$500,000.

In the meanwhile, the level of service UP is providing to FPP continues to fall far below the demand for coal. Under its Service Recovery Plan, UP is limiting bulk shipments of both coal and grain to only three trains per day south of Fort Worth, Texas. All alone, FPP's generating demand for coal is 1.8 trains per day -- well over one-half of the total volume of total bulk commodity movements being made by UP to the area. FPP is in fact receiving a little under one train per day.

In short, UP is unable to deliver enough coal to meet the FPP's daily burn, and the FPP's stockpiles continue to be depleted. Because of UP's service failures, LCRA has had to commit to conservation strategies that minimize FPP's coal consumption. The additional costs that LCRA/Austin are incurring as a result of UP's service failures are directly paid by Texas consumers in the form of higher electricity rates. Unfortunately, the problem that LCRA and other WCTL members are currently experiencing with UP service is only expected to get worse in the upcoming months as utilities approach their peak winter demand season.

The impacts of the severe service problems and deficiencies which have arisen from the UP/SP consolidation are not limited to shippers dependent on the Union Pacific system. There is mounting evidence that some of the steps taken by UP in an effort to solve its problems -- notably shifting Texas coal traffic to the Burlington Northern Santa Fe -- have resulted in

service inadequacies for shippers that utilize BNSF service as well.

West Texas Utilities Company, a subsidiary of WCTL Member Central & South West Corp., operates the Oklaunion Generating Station near Vernon, Texas. WTU depends on BNSF to deliver the approximately 3 million tons of coal needed each year to meet Oklaunion's fuel requirements. Transportation takes place in BNSF cars moving in common carrier service, under rates prescribed by the Board in Docket No. 41191, West Texas Utilities Company v. Burlington Northern Railroad Company, May 3, 1996.

On average, four trainsets are needed to haul WTU's annual volumes from their Wyoming origins. WTU reports, however, that BNSF has cut back its Oklaunion equipment commitment to only two trainsets. The result, according to WTU, is that Oklaunion coal receipts for the balance of 1997 could fall short of requirements by as much as 50 percent.

As the Board deliberates current regional service problems in this proceeding, it is important that the agency's focus not be limited to high-profile UP coal and chemical traffic. As WTU's experience demonstrates, the remedies considered by the Board likewise must address the directly-related service deficiencies that have now extended to BNSF.

III.

Solving UP Service Problems

Despite repeated WCTL warnings made in the UP/SP consolidation proceeding about future service problems, the Board apparently failed take a "hard look" at the Applicants' operating plan, or to take sufficient action to ensure that service disruptions would be minimized. As such, the damage has been done so to speak.

Because UP traditionally has been a strong carrier, WCTL believes that the UP problem is relatively short-term. Accordingly, the situation requires a short-term solution. In this regard, the Board should immediately take two steps. First, the Board should impose a 45 day moratorium on any action that would interfere with UP's operations and the implementation of its Service Recovery Plan. During this time, the Board should closely review the Applicants' service improvements and devise an Emergency Recovery Plan of its own for use in the event that the UP situation has not improved dramatically by mid-December. If there is no significant turn-around by mid-December, the Board should impose its own Emergency Recovery Plan.

The Board is empowered by law (at 49 U.S.C. § 11123) to take immediate remedial action where "congestion" and related problems on a railroad adversely effects the shipping public and/or where a rail carrier cannot transport the traffic offered to it. As our statement clearly discloses, the situation today on the UP lines indisputably warrants the Board's intervention

pursuant to its emergency powers. If it acted, the Board could require other carriers to operate over UP's lines and vice versa and/or it could impose a priority system for UP's services. In so many words, the law permits the Board to substitute a Recovery Plan of its own for the Service Recovery Plan adopted by UP. Unlike the UP's plan, however, the Board's plan could contain measures involving other railroads which go well-beyond UP's plan.

WCTL disfavors the imposition of such Draconian relief at this time because we question whether the Board has the resources to accomplish what UP itself cannot: namely, the efficient management and operation of the merged UP/SP system. The advantage of WCTL's requested relief is that it gives UP time to turn around its operations and it gives the Board time to weigh more drastic alternatives. For this reason, WCTL urges the Board to consider a 45 day moratorium for study purposes before it takes any action pursuant to § 11123. In the event that the Board prefers to act pursuant to Section 11123, its actions should be confined to only providing UP with additional labor and locomotive power.

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On behalf of the members of WCTL, we thank you for the opportunity to present our views on western rail service problems and on how these problems can be overcome.

Appendix 1

WESTERN COAL TRAFFIC LEAGUE

Arizona Electric Power Cooperative, Inc.

Central Louisiana Electric Company, Inc.

Central and South West Services, Inc.

City Public Service Board of San Antonio

Fayette Power Project, Austin, Texas

Houston Industries, Inc.

Kansas City Power & Light Company

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Unitrain, Inc.

Western Resources, Inc.

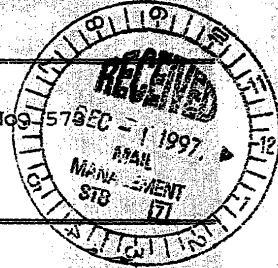
Wisconsin Public Service Corporation

BEFORE THE
SURFACE TRANSPORTATION BOARD

STAMP & RETURN

RAIL SERVICE IN THE
WESTERN UNITED STATES

Ex Parte No. 578EC



STATEMENT OF
THE WESTERN COAL TRAFFIC LEAGUE
BEFORE THE SURFACE TRANSPORTATION BOARD
PUBLIC HEARING -- DECEMBER 3, 1997

In accordance with the Board's Decision served November 21, 1997, the Western Coal Traffic League ("WCTL")¹ submits this written statement to the Surface Transportation Board on the continuing rail service problems in the western United States. WCTL appreciates the opportunity to testify before the Board on the rail service crisis in the west; on whether service projections made by UP at the Board's October 27, 1997 public hearing are being met; and on suggestions to improve the situation.

¹ The Western Coal Traffic League is a voluntary association of electric utilities who burn coal as a primary fuel source and who transport that coal to their utility generating stations via rail obtained from mines in the western United States.

I.

UP's Progress on Unit Train Coal Movements

In the Board's initial October 27, 1997 public hearing on western rail service, WCTL testified as to the severe disruptions in unit coal train service being caused by UP's service problems. Unfortunately, from the viewpoint of WCTL members, UP's service recovery efforts are achieving mixed progress at best and UP's overall recovery is far below what it promised at the Board's October 27th public hearing. In short, UP is unable to deliver enough coal to meet many of its utility customers' requirements, and stockpiles continue to be depleted. UP's difficulties have caused tens of millions of dollars in added costs for electric utilities that utilize coal as a fuel source, and who have been forced to turn to much more expensive fuels and/or purchased power to make up for the coal delivery shortfalls caused by UP's deficient service.

Despite repeated assertions made by UP during the Board's first hearing on October 27 that its "northern tier" problems were "fixed" and its operations in the "southern tier" had turned the corner and would rapidly be returning to normal, it is clear that major service problems continue. In its written statement for the Board's October 27, 1997 hearing in this matter, WCTL described the coal transportation problems being experienced by the Lower Colorado River Authority and the City of Austin ("LCRA/Austin"), joint owners of the Fayette Power Project ("FPP"), as representative of those being faced by UP-served WCTL

members. At the hearing, LCRA/Austin testified that UP cycle times were approximately double its one week normal transit times for Powder River Basin movements; that it normally maintained a 50-60 day supply of coal, that it had only a two week supply of coal; and that UP shipments for the third quarter of 1997 were more than 500,000 tons below contract standards. Unfortunately, despite UP's promises that its service would be substantially improved, if not back to normal by this time, LCRA/Austin's service has improved only slightly since the Board's last hearing. LCRA/Austin's unit train cycle times have shown some improvement and, for the month of November, are running at approximately 11 days. Focusing on deliveries, in the month of November, UP delivered 1.0 trains per day, versus .9 trains per day for the month of October. Meanwhile, LCRA/Austin requires 1.8 trains per day for a full burn rate and their coal supply stockpiles remain unacceptably low.

UP-caused service problems have produced significant negative financial repercussions for LCRA/Austin. All together, LCRA/Austin has paid approximately \$26 million to date in added fuel costs associated with coal substitution actions necessitated by UP's failure to meet its service obligations.² Every day, LCRA/Austin are experiencing approximately \$400,000 in added costs as a result of UP's lack of service. These incurred costs ultimately must be paid by the approximately one million Texas

² These additional costs are significantly higher than the approximately \$8 million in added costs LCRA/Austin at the time of the Board's October 27, 1997 hearing.

consumers who utilize this power.

WCTL member, City Public Service Board of San Antonio, Texas ("CPSB"), also testified at the October 27th hearing, reporting that UP's cycle times for the month of September averaged an unprecedented 18.5 days, and that it received less than 40% of its coal requirements in September. Since the month of September, cycle times for CPSB improved to an average of 11.5 days. While there has been an improvement in cycle times for CPSB since September, UP's current cycle times still remain significantly above contractual obligation levels and UP owes CPSB hundreds of thousands of deficit delivery tons.

In order to meet customer demands, among other things, CPSB has turned to South America to supply it with a portion of its fuel requirements; it is currently shipping a limited amount of Columbian origin coal. Additionally, BNSF is running two coal trainsets to CPSB, CPSB has initiated deliveries of petroleum coke as a fuel source, and it has increased the use of natural gas. At the Board's October 27 hearing, UP promised that further service improvements for its southern tier would be made immediately, and CPSB had hoped that the expensive alternative fuel strategy actions that it has taken could be curtailed by this time. This has not been the case, and CPSB has been forced to continue its alternative fuel arrangement strategies. CPSB's coal stockpile is at minimally acceptable levels for the winter months and if it were not for the above-referenced actions to control its coal burn, CPSB's stockpile would now be depleted.

Besides the continuing rail service problems facing WCTL Members located on UP's southern tier, WCTL is also extremely concerned about reports from members about service deterioration for UP's northern tier customers. For example, since the Board's last hearing, because of deficient UP coal delivery service, one midwestern utility was forced to shut down one of its coal fired facilities. Such reports on UP problems being experienced with its northern tier service are of significant concern.

Additionally, it is important to mention that western rail service problems are not limited to UP alone. The Burlington Northern and Santa Fe (BNSF) is also experiencing problems with its unit train coal service and in meeting its customer contractual obligations. BNSF reported in its November 14, 1997 filing with the Board that it is operating 278 trainsets in unit coal train service, and has taken on additional coal traffic. BNSF has increased coal traffic in the third and fourth quarters of 1997 in response to UP's difficulties, and in order to meet increased seasonal demands. There is no doubt that the "ripple effect" of UP's problems has begun to reach BNSF, which also is struggling to keep up with its obligations. WCTL is concerned about the possibility of BNSF overextending itself in its efforts to serve shippers who have been adversely affected by UP's service problems.

III.

WCTL PROPOSED BOARD ACTIONS

As described below, WCTL has two principal suggestions that the Board should consider to help improve the efficient movement of rail transportation in the west, and that would provide the public with more informative progress reports on UP's service. As mentioned by WCTL in our October 27th testimony submitted to the Board, we question whether drastic government action is appropriate to solve UP's current situation; broad scale involvement by the STB in UP's operations may only prolong UP's recovery. At the Board's last hearing, WCTL urged the Board to wait 45 days before it considered taking any significant action, so that UP's efforts to implement its service recovery plan could proceed without interference. WCTL continues to believe that the time for extensive government intervention has not yet been reached. However, with that said, there are certain more limited actions that the Board can take immediately to improve the rail transportation situation in the west and to provide the public with more informative progress reports on UP service and its recovery efforts. Importantly, such actions should not interfere with UP's own service recovery efforts.

First, as a matter of policy, the Board should require UP to respond reasonably to service assistance proposals made by other rail carriers capable of assisting UP with its service problems, and alternative routing proposals made by major shippers. UP should not be permitted to follow its normal

business instincts and reject competitors' offers of assistance if such offers would improve service for UP customers without adverse impacts on the overall recovery effort. If UP cannot demonstrate that a customer would be adversely affected by a requested alternative service arrangement, or that its service recovery plan would be harmed thereby, it should be required to accept the alternative transportation arrangement. To the extent that UP and other parties cannot themselves promptly work out an alternative transportation arrangement, the Board should encourage parties to file with the agency, for expedited consideration, an emergency request for alternative service.

The necessity for this kind of relief is evidenced by the letter filed with the Board on November 26, 1997 by the Illinois Central Railroad ("IC"). In that letter, IC indicated that it currently has excess locomotives and crews on its system that can be utilized for coal train movements.³ Unfortunately, as IC's letter of November 26 explains, despite offers made to UP by IC to move this traffic, to date, UP has refused such assistance. In addition to IC, other carriers, including the Kansas City Southern Railway, also have indicated that they have excess locomotives and crews that can assist UP in serving its customers.

The effect of the above-referenced suggestion would be to require UP to live up to its repeated assertions that non-UP

³ IC reports that it can provide 1-2 daily trains at Council Bluffs for movements to electric utilities on its lines.

alternative routing arrangements are being accepted to the extent that it can be shown that service will be improved. It would also enable UP to free-up desperately needed power and crews, and help mitigate UP's severe congestion problems. In summary, where additional power and crews are available from other railroads to serve UP customers experiencing deficient service, the burden should be on UP to demonstrate why it should not be required to accept offers of assistance that can improve that service.

The second action that the Board should implement at this time is to require UP to bolster its weekly reporting requirements on unit train coal movements as requested by WCTL President Dan Kloock in his October 7, 1997 letter to the Board. (See Attachment A). As explained above, WCTL is concerned about unsubstantiated, self-serving statements being made by UP about improved service. As outlined in detail in WCTL's October 7th letter, we strongly believe that UP must objectively report on its unit train coal service movements and provide such data in sufficient detail for coal shippers, the Board, and the public to determine the extent to which service improvements are actually being made and whether UP is living up to baseline and promised performance levels.⁴

⁴ In UP's November 14, 1997 filing with the Board it objected to the weekly filing of the requested data, noting that the information "becomes increasingly valuable to competitors as it becomes more specific, which would be of little utility in assessing overall service recovery, and which would be burdensome to prepare." UP's objections should be rejected. First, none of the data requested (which would be aggregated on the basis of origin coal production regions and destination states) would require UP to reveal any confidential or sensitive information.

In closing, WCTL remains optimistic that UP can resolve its service troubles over the long-term. However, WCTL is concerned that UP has not done enough to enlist the assistance of other carriers and its customers in resolving its crisis. UP also has failed to provide the Board and the public with sufficient detailed performance information with respect to unit train coal movements to allow for an objective assessment of UP's recovery efforts. WCTL urges the Board to accept its proposals with regard to both of these issues.

Thank you again for allowing WCTL the opportunity to address the Board in this important proceeding.

Respectfully submitted

C. Michael Loftus

By: William L. Slover
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1224 Seventeenth Street, N.W.
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Dated: December 1, 1997

Attorneys for the
Western Coal Traffic League

Additionally, in light of UP's October 14, 1997 letter to the Board pledging its commitment to "provide meaningful data on its service recovery efforts" in its reports, and in light of its statement in the same letter that it compiles similar data on a daily basis, UP's objections are without merit. WCTL assures the Board that such information is necessary and critical to evaluating UP unit coal train movement performance.

THE WESTERN COAL TRAFFIC LEAGUE

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Dallas, Texas

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City Public Service Board
San Antonio, Texas

Paul Freund
MidAmerican Energy Co.
Davenport, Iowa

November 7, 1997

The Honorable Linda Morgan
Chairman
Surface Transportation Board
1925 K Street, N.W., Room 820
Washington, D.C. 20423

Re: Ex Parte No. 573, Rail Service
in the Western United States

Dear Chairman Morgan:

The purpose of this letter is to suggest to the Board an important improvement in the weekly indicators of performance being provided by UP with regard to coal transportation in the west.

The Western Coal Traffic League commends the Board for its prompt efforts to investigate and mitigate service problems in the west resulting from UP's recent troubles. We appreciated the opportunity to testify before the Board during its October 27, 1997 public hearing on the critical service deficiencies faced by western coal shippers.

We have reviewed with interest the Board's Service Order No. 1518 served last Friday, October 31, 1997, as an outgrowth of this proceeding. Among other things, the Service Order requires UP to augment its weekly performance reports filed with the Board (as required by the Board's October 15, 1997 decision) to include information "on unit train cycle time for coal train operations." As required, UP filed with the Board its weekly report of indicators of its service recovery efforts on November 3, 1997. UP's submission included the category "Coal Cycle Days," which is described in part by UP as follows:

The Honorable Linda Morgan
November 7, 1997
Page 2

This is the average cycle time for unit coal trains measured from release of loaded trains by shippers to return of the empty trains to loading locations. It includes all UP/SP unit coal trains, including those loaded in the Powder River Basin, Southern Illinois, Utah and Colorado. The cycle time excludes loading and unloading time and delays for which shippers are responsible.

The Coal League is greatly concerned that the information being provided by UP on coal movements is insufficient as an effective monitoring measure. Based on the UP's performance indicator, it would appear that UP's cycle times for the movement of coal for the week ending October 31, 1997 are virtually back to normal. (UP's baseline average time was 6.1 versus 6.2 for last week). Unfortunately, this is certainly not the case. For many coal shippers -- especially those located in UP's "southern tier" states (including Texas, Arkansas, Louisiana, and Oklahoma) -- average train cycle times have been averaging well over double what they were in early January. The fact remains that UP's current service is significantly inferior to baseline levels of performance for many of its coal transportation movements.

In order to evaluate UP's service effectively, we respectfully request that the Board order UP to provide more focused information in its weekly reports on unit coal train movements. In particular, rather than providing performance data on a systemwide basis, UP should report separately on the following:

(1) movements over routes from each principal coal origin region (Powder River Basin, Utah, Colorado, and Southern Illinois) to (a) northern tier destinations and (b) southern tier destinations; and

(2) movements over routes from each principal coal origin region (Powder River Basin, Utah, Colorado, and Southern Illinois) to each of the four problem southern tier destination states.

For each of the above route categories, the following weekly performance data should be reported: (i) actual tons of coal loaded; (ii) average number of trains and trainsets in service; and (iii) average total roundtrip train cycle times. All of this performance data is necessary because cycle time information alone is not a reliable indicator of service

The Honorable Linda Morgan
November 7, 1997
Page 3

performance, (especially if trains or trainsets are being taken out of service to improve cycle times).

The above requested information will provide the public and the Board a clearer indication of how UP is actually performing with regard to coal transportation movements, especially in the problem southern tier states. The requested information will also give individual utilities a meaningful measuring stick by which to gauge UP's overall unit train coal service against what is actually being provided. The Coal League appreciates the Board's attention to this important matter.

Sincerely,

Dan Kloock

Dan Kloock
President

cc: Parties of Record in UP Oversight Proceeding

CERTIFICATE OF SERVICE

I certify that I have this 1st day of December, 1997, served copies of the foregoing Statement of the Western Coal Traffic League by first class mail upon counsel listed on the Service List in this proceeding.

C. Michael Loftus
C. Michael Loftus

BEFORE THE
SURFACE TRANSPORTATION BOARD



RAIL SERVICE IN THE
WESTERN UNITED STATES

Ex Parte No. 573

Service Order No. 1518

STATEMENT ON WESTERN RAILROAD SERVICE BY
THE WESTERN COAL TRAFFIC LEAGUE

This Statement is submitted on behalf of the Western Coal Traffic League ("WCTL") pursuant to the Surface Transportation Board's ("STB") Decision served January 13, 1998 in the above-referenced proceeding requesting information from railroad shippers on the western railroad service crisis. The purpose of this Statement is to respond to the Board's request for railroad performance information and to comment on the need for an extension of the Board's Emergency Service Order upon the expiration of the current Order on March 15, 1998.

WCTL is a voluntary association whose membership is composed of shippers and receivers of coal mined west of the Mississippi River. Each WCTL member is a major consumer of western coal, and each moves substantially all of its coal by rail. The great majority of these movements are made by the Union Pacific Railroad Company ("UP") and the Burlington Northern and Santa Fe Railway Company ("BNSF"). WCTL is the only association composed exclusively of those who ship, receive, and pay the applicable charges on high-volume movements of western coal.

WCTL members ship in excess of 95 million tons of coal per year. Its members are listed in Appendix A.

The Board has requested from shippers certain "benchmark" railroad performance data covering the four-month period ending February 6, 1998, and comparative data from the same period a year earlier. The STB requests this information as a supplement to the service performance data which it is already receiving from UP and BNSF who have been filing with the Board certain weekly and quarterly reports on their operational performance. The Board has indicated that the data collected will be used to determine whether its current emergency service order, which expires on March 15, 1998, should be extended and/or revised.

I.

INTRODUCTION AND SUMMARY

WCTL has conducted an extensive internal review of UP and BNSF performance service data in accordance with the Board's January 13, 1998 Decision. This information is set forth in detail below. In summary, from the perspective of WCTL and its membership, the assembled data on UP's service performance demonstrates that while certain improvements have been made, a railroad service crisis continues to exist in the western United States, and the Board and the affected railroads must continue to take actions to address these problems. In fact, the most recent data indicate that UP service may be deteriorating once again to the levels observed last Fall. There is also reason to

concerned about spillover impacts on BNSF service to coal shippers, particularly in light of a major planned BNSF construction project.

In the Board's very first hearing on the western railroad crisis held on October 27, 1997, UP promised the Board, its customers, members of Congress, and the public that its service problems would be solved by last Thanksgiving. Since that time, UP has "declared victory" and continues to make public statements that, except for a few trouble spots, its service crisis is over. From the viewpoint of WCTL, such statements are disconcerting and counterproductive and belie the fact that at least substantial numbers of its core customers continue to suffer both operationally and economically as a result of UP's continuing service problems.

Since first commenting to the Board on the western service crisis in October 1997, WCTL has emphasized that only through continuing Board oversight, and continuing and extended cooperative arrangements made between the railroads and their customers, can promised railroad performance standards be met. To the Board's credit, it has recognized that despite UP's declarations to the contrary, its service problems continue to exist, and extended steps must be taken to deal with those problems. Additionally, UP's customers are not the only ones suffering from the service crisis in the west. BNSF, in part as a result of its efforts to assist UP and its customers during the current crisis period, is facing its own operational

difficulties. These service difficulties, while certainly not as severe as those facing the UP, are something that the Board should continue to monitor closely.

Problems continue to be particularly severe in UP's southern tier. In its decision served February 17, 1998, the Board attributes the situation in Texas in at least major part to infrastructure problems in the Houston area. "The fact is . . . that until the infrastructure is upgraded, regardless of which carrier operates what lines, the threat of a further crisis will continue." STB Service Order No. 1518, Joint Petition for Service Order, Decision served February 17, 1988, at 12.

The premise underlying the recently announced BNSF-UP joint dispatching arrangement seems to be that the root of the problem in the Houston area is more operational in nature. Whatever the true cause, or perhaps more accurately, the true proportions of the various contributing causes, the fact is that the steps taken thus far have not cured the problem. The service performance information that UP is supplying to the Board demonstrates the unsettling fact that, on various occasions, UP is experiencing considerable setbacks in its service recovery. In fact, UP's weekly performance data from Monday of this week reveals that critical measures of UP's performance such as system train speed are deteriorating to the levels experienced during October and November 1997.

Because of the service problems that UP continues to face, and more specifically, because of UP's inability to meet

promised performance standards and customer obligations in transporting coal, WCTL respectfully requests that the Board extend its emergency service order for another six-month period through September 1998. As the Board continues to monitor railroad service problems in the west, there are several new western railroad service developments to which the Board should pay particularly close attention. These include the recent joint UP/BNSF proposal for dispatching and service in and around Houston, Texas, and BNSF's 40-day construction project at Guernsey, Wyoming planned for this Spring. These issues are discussed in more detail below.

II.

DISCUSSION

A. UP's Internal Service Performance Indicators

In recent weeks, UP has made numerous public assertions on progress that has been made in speeding up the movement of its coal unit trains. For example, UP's February 2, 1998 cover letter to the Board accompanying its sixteenth weekly report of indicators asserts as follows:

Since the beginning of 1998, we have been reporting strong coal loadings. With the first month of the new year not complete, we can report a number of record figures. For the month of January, UP/SP ran 827 trains per day. Over the course of the month, UP/SP loaded approximately 11 million tons of coal, more tonnage than has ever been loaded in any one-month period.

UP's fifteenth weekly report of indicators on January 26, 1998 states that UP is averaging 27 loaded trains per day out of the Powder River Basin coal region.

According to recent trade press reports, at a recent speech before coal mining industry representatives, UP's senior vice president for energy reported that UP hauled 188 million tons of coal in 1997, the same level that was hauled in 1996, and indicated that UP intends to haul 215 million tons in 1998, more than it and SP had ever transported in a single year. He also reported that it will take time to restore coal inventory levels back to normal at UP-served power plants, and that UP's recent problems with coal deliveries were in part a result of the carrier's decision to divert locomotives from coal service to manifest service.

On January 19, 1998, UP's Chairman and Chief Executive Officer, Dick Davidson delivered a speech at the Omaha Press Club where he stated that "[e]xcept for the Texas-Louisiana Gulf area, Union Pacific service is virtually back to normal." Mr. Davidson defined "normal" as follows:

"Normal" means that we are operating an average of 2,000 trains over 36,000 miles of track in 23 states every day. Those trains are hauling freight to thousands of customers, ranging from coal-fired utilities to automobile dealers -- most of whom are seeing improvement in transit times for their products.

"Normal" also means that important service indicators that we use to track our daily performance -- such as average train speed, car inventory, train hours delayed for power and crew and many others -- are improving to

the point that they're about where they were last summer. That's still not where we need to be, but it's one heck of an improvement from where we were during the final three months of last year.

While UP may be achieving its goals for internal performance indicators, this is of little comfort to electric utilities who continue to suffer as a result of UP's poor service. The fact is that UP's performance continues to lag. Contractual cycle times are not being met, the number of tons being delivered is deficient, and inventory levels remain too low. None of UP's customers measures "normal" service by the number of systemwide trains in operation, the number of tons of coal loaded at a group of mines, or the achievement of internal service indicators. For UP's customers, what matters is receiving promised service and the delivery of the needed volume of coal on a timely basis. From the vantage point of many of UP's coal customers, UP's service is anything but normal, and, in fact, continues to be far from satisfactory.

1. The Performance Data Demonstrates that UP
Continues to Face a Service Crisis

Pursuant to the Board's request, WCTL has gathered information from individual members for both UP and BNSF service covering the four-month period ending February 6, 1998, and comparative data from the same period ending one year earlier. Because of the confidential nature of much of this information, the data is provided only in an aggregated basis in order to maintain appropriate confidentiality. For convenience, the data

was compiled on a month-by-month basis for the following months: October 1996 through January 1997 and October 1997 through January 1998. WCTL compiled information from members on a plant-by-plant basis. Information gathered included average train cycle time (excluding loading and unloading time), tonnage delivered, coal inventory information, deficit tonnage owed under applicable contracts, and other service data. WCTL also inquired of specific alternative coal transportation arrangements that were secured by members as a result of the ongoing UP service crisis.

a. UP's Cycle Times are 22.5 Percent
Slower than Last Year

Attached as Exhibit No. 1 is a chart containing data comparing, on a month by month basis, UP average coal unit train round trip cycle times (in hours) for WCTL members from October 1997 through January 1998 and for the same time period a year earlier. The chart is a compilation of data from WCTL members who have plants that are served exclusively by UP or are jointly served by UP and another carrier. Overall, this data demonstrates that UP suffered a 22.5 percent increase in average cycle times in November 1997 through January 1998 as compared to the same period from the year prior. This data shows that UP's cycle times improved from an average of 260 hours in October 1997 to 218 hours in January 1998. However, even with this improvement, the average cycle time for the month of January 1998

was 23 percent above the level that it experienced in January 1997.

Additionally, UP continues to lag far behind in its contractual cycle time performance levels. Complete contractual cycle time data was not available from all WCTL members, and, indeed, the manner in which contractual cycle times are computed may vary from contract to contract. However, data received on contractual cycle time performance indicates that UP's actual cycle times from October 1997 through January 1998 were approximately 35 percent above contractual obligation levels.

b. Number of Tons Delivered and Inventory Levels Continue to Lag

For WCTL members, UP delivered on average approximately 22.1 percent less coal from October 1997 through January 1998 than it did for the same period a year earlier (or approximately 3 million less in overall tonnage deliveries). Largely because of UP's failure to deliver sufficient volumes of coal, electric utility coal inventory levels dwindled in the past year. Target coal inventory levels for electric generation plants vary both from plant-to-plant and seasonally, depending on customer demand levels. For WCTL members, targeted inventory levels generally range from 25 to 105 days of generation supply. The goal, of course, is to maintain as close to targeted inventory levels as possible.

Attached as Exhibit No. 2 is a chart demonstrating the difficulties that electric utilities are facing in maintaining

targeted coal stockpile levels. The chart is a compilation of data from WCTL members who have plants that are served exclusively by UP or that are jointly served by UP and another carrier. Largely because of UP's failure to provide sufficient service, WCTL members' average stockpile levels from October 1997 through January 1998 were approximately 40 percent lower than they were a year ago. During October 1996 through January 1997, WCTL members' coal inventory averaged approximately 95 percent of targeted levels (and generally remained within 5 percent of targeted levels). During the same time period this year, coal inventory averaged only 55 percent of target levels.

Many railroad/shipper coal transportation contracts require the movement annually of certain minimum tonnage. As a result of UP's service problems, UP accumulated over 3 million tons of contractual coal tonnage deficits for WCTL members in 1997. In contrast, the membership reported no such deficits as of the end of 1996.

If it were not for coal conservation actions taken by WCTL members in the last year, coal stockpile levels would be even lower than the levels indicated above. In response to deficient UP service and dwindling coal inventory levels, in the past four months, WCTL members have implemented a number of coal conservation strategies. Among other things, WCTL members have taken coal fired plants off-line and/or have reduced electric generation output in order to conserve coal stockpile levels. Where permitted and possible, BNSF service has been utilized and

overseas coal and petroleum coke have been purchased to supplement coal delivered by UP. Additionally, WCTL members have displaced coal fuel sources by utilizing non coal-fired units (e.g., natural gas), and have purchased power from other utilities. Finally, off-system sales have been significantly affected.

In the aggregate, UP's service problems have caused tens of millions of dollars in added costs for WCTL members, who have been forced to turn to much more expensive fuels and/or purchased power to make up for the coal delivery shortfalls caused by UP's deficient service. WCTL members' coal inventories continue to be too low. While members had hoped to have discontinued expensive coal displacement/replacement strategies by now, they have been forced to continue such strategies as a result of UP's continuing service problems and the need to try to rebuild stockpiles for the summer peak demands.

In summary, the above information demonstrates that UP's rail service problems are continuing and its service recovery efforts are achieving only mixed progress at best, with its service continuing to be below contractual performance levels.

B. BNSF's Service Performance

Western railroad service problems are not limited to UP alone. BNSF is also experiencing some problems with its unit train coal service and in meeting customer contractual obligations. In response to UP's difficulties, and in order to

meet increased seasonal demands, BNSF increased its coal traffic in the third and fourth quarters of 1997. In previous testimony, WCTL has expressed its concern about the possibility of BNSF overextending itself in its efforts to serve shippers who have been adversely affected by UP's service problems.

The data gathered by WCTL on BNSF service shows that while BNSF is experiencing certain service problems, and not all utilities are receiving adequate service, the carrier generally is meeting customer service requirements. However, because its problems have not been completely solved, the Board should continue its oversight of BNSF.

In this regard, it is important to mention the February 13, 1998 agreement reportedly reached between BNSF and UP on dispatching and trackage rights in Houston and in the Gulf Coast region. WCTL has not seen this agreement and has only limited information on the arrangement. It is not clear what impact, if any, the arrangement may have on the nature or timing of the infrastructure improvements that the Board has indicated it believes must be undertaken in the Houston area. It is clear that the Board will have to scrutinize this arrangement carefully and monitor its impacts on UP's and BNSF's operations. The possibility of more severe impacts on BNSF's operations as a result of this new arrangement is of significant concern to WCTL members. Concerns about BNSF's service are accentuated by the fact that BNSF is planning a 40-day shutdown of its Guernsey, Wyoming route out of the Powder River Basin from April 1 through

May 10, 1998. Attached as Exhibit No. 3 is a letter that BNSF sent to its customers in December 1997 explaining that it will be "daylighting" a single-track tunnel three miles north of Guernsey in order to double track the line between Guernsey and Bridger Junction, Wyoming. During the 40-day construction period, the Guernsey route will be closed to all traffic. As a result, BNSF anticipates that 25 coal trains per day will need to be rerouted.

While it is gratifying to see that BNSF is taking action to improve its rail service from the Powder River Basin region, WCTL members are concerned about the short term impact of BNSF's Guernsey project, and the possibility that such impacts might interact in some fashion with spillover effects of continuing UP service problems on BNSF. For these reasons also, WCTL urges the Board to monitor carefully the ongoing situation for coal transportation service in the west.

CONCLUSION

As the above information details, UP continues to experience substantial problems in meeting its service requirements. Despite UP's claims to the contrary, rail service in the western United States remains far from "normal." In order to resolve the lingering service crisis in the western United States, WCTL respectfully requests that the Board extend the current emergency service order expiring on March 15, 1998 for an additional 60 days. Additionally, in the immediate future, the Board should closely study the UP/BNSF February 13, 1998 trackage

rights/joint dispatching agreement and solicit shipper views on same to evaluate its impact on railroad service.

WCTL appreciates this opportunity to address the Board on the continuing western service crisis.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

OF COUNSEL:

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1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: February 20, 1998

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Attorneys for the Western
Coal Traffic League

WESTERN COAL TRAFFIC LEAGUE

Arizona Electric Power Cooperative, Inc.

Central Louisiana Electric Company, Inc.

Central and South West Services, Inc.

City Public Service Board of San Antonio

Fayette Power Project, Austin, Texas

Houston Industries, Inc.

Kansas City Power & Light Company

Lower Colorado River Authority

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

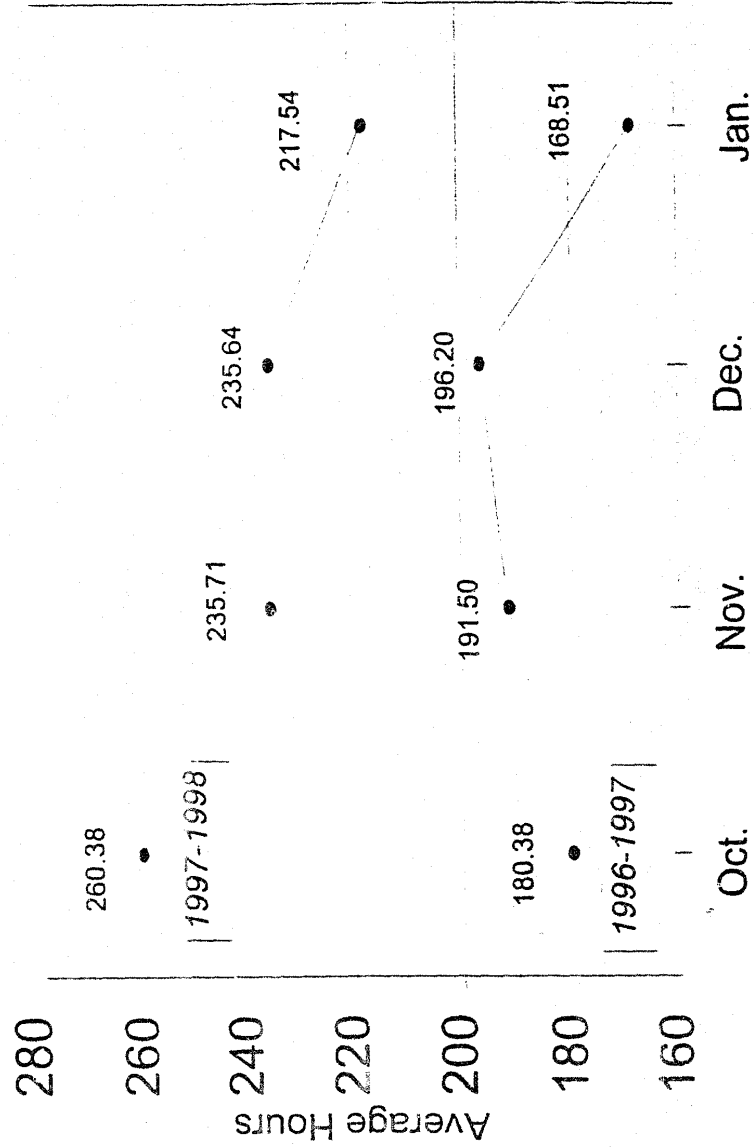
Unitrain, Inc.

Western Resources, Inc.

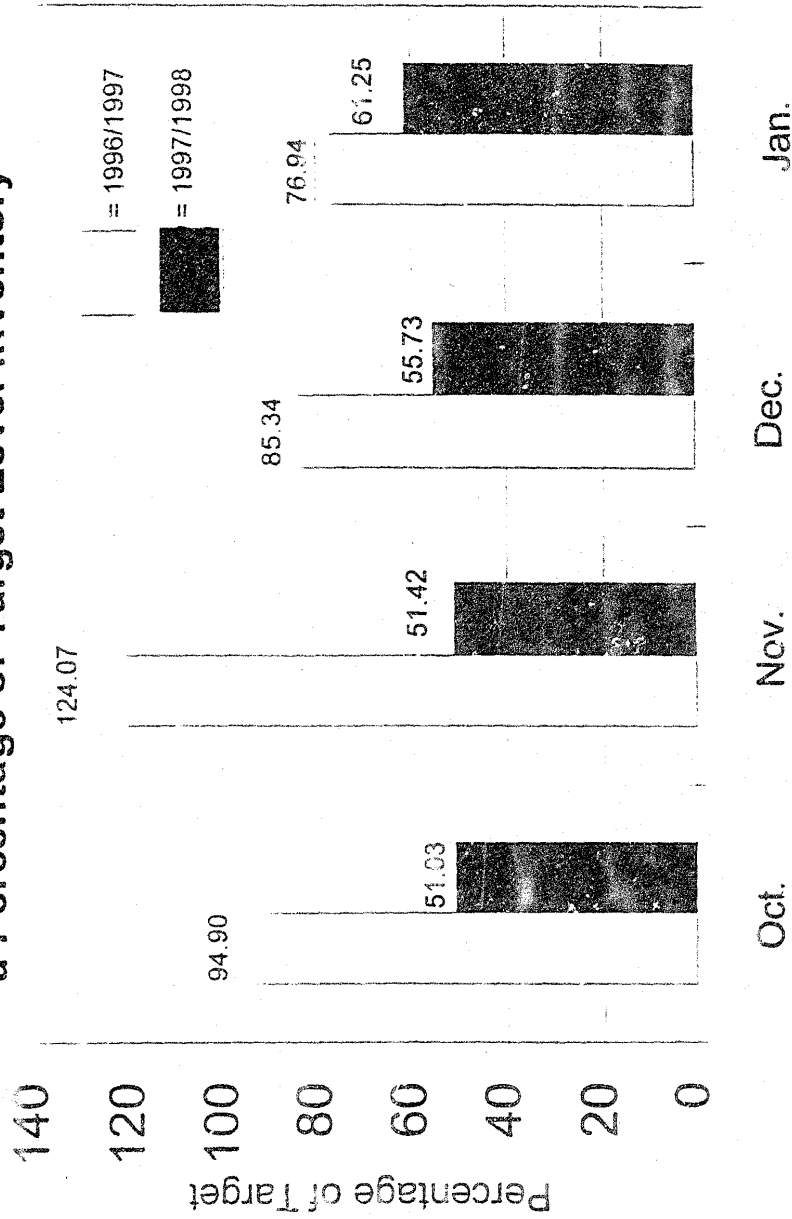
Wisconsin Public Service Corporation

UP CYCLE TIMES FOR WCTL MEMBERS

(UP Single and Combined Movements)



WCTL Member Coal Inventory on Hand as a Percentage of Target Level Inventory



BNSF



THOMAS G. KRAEMER
Vice President
Coal and Grain Operations

Burlington Northern Santa Fe
P.O. Box 961051
Fort Worth, Texas 76161-0051
Tele 817 352-6242
Fax 817 352-7199

Exhibit No. 3

December 19, 1997

Dear [REDACTED]:

In the past two years, BNSF has invested more than \$4 billion of capital in facilities and equipment, and we plan to spend another \$2 billion in 1998, including acquisition of 382 additional locomotives and several major track and yard capacity expansion projects. Each project is designed to enhance service, efficiency and consistency for our customers.

For many years, we've invested aggressively in the Powder River Basin to ensure we can meet customer expectations for this critical part of our business. Investments in the Powder River Basin (PRB) will continue at a high level in 1998. We wanted to give you advance notice, however, that one track construction project near Guernsey, Wyoming may bring temporary delays to some of your BNSF coal shipments between April 1 and May 10, 1998.

We expect to see large traffic increases on the route through Guernsey as companies prepare to meet more stringent clean air regulations effective in 2000. In fact, 75 percent of BNSF's coal growth over the next three years is projected to move via Guernsey.

To improve service and to handle this growth, we need to build a second track along part of our Guernsey route. Before we can add this capacity, we first must "daylight" a 92-year-old, single-track tunnel approximately three miles north of Guernsey. We will demolish the 1,930-foot tunnel, removing over 900,000 cubic yards of earth, and rebuild 1.7 miles of existing main track in the open cut. A 1.44-mile siding that parallels the main track will be rebuilt and extended by 1.73 miles. By the end of the project, we will have over three miles of new double track between Guernsey and Bridger Junction, Wyoming, which will put us in much better shape to meet your future coal transportation needs.

JAN 85 FEB 85 MAR 85 APR 85 MAY 85 JUN 85 JUL 85

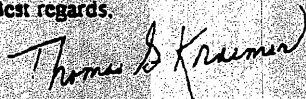
December 19, 1997
Page 2

We have planned an extremely aggressive schedule for the actual tunnel demolition and track construction, accomplishing the entire project in 40 days, from April 1 through May 10, 1998. We selected this time window specifically to minimize the impact on our coal shippers, since late spring is historically a period of lower coal demand. Our engineering and operations people are already gearing up to ensure we meet this very aggressive schedule and can re-open the line by May 11. During that 40-day window, however, the Guernsey route will be closed to all traffic, and approximately 25 trains a day will have to be re-routed.

BNSF operations and marketing people have developed an operating plan to maintain customer service commitments while this portion of track is closed. In general, this plan calls for increased traffic between Denver and the PRB via our Cheyenne-Wendover route, as well as on our Sterling-Alliance-Edgemont route entering the PRB from the north. These routes are highlighted on the attached map. Your BNSF marketing representative will personally discuss the plan with you in more detail and answer any questions or concerns you may have.

We regret any short-term inconvenience this construction project may bring; however, we will make every possible effort to keep that inconvenience to a minimum. Please realize that our entire rationale for the Guernsey expansion project this year is to ensure we can meet your service expectations in the future.

Best regards,

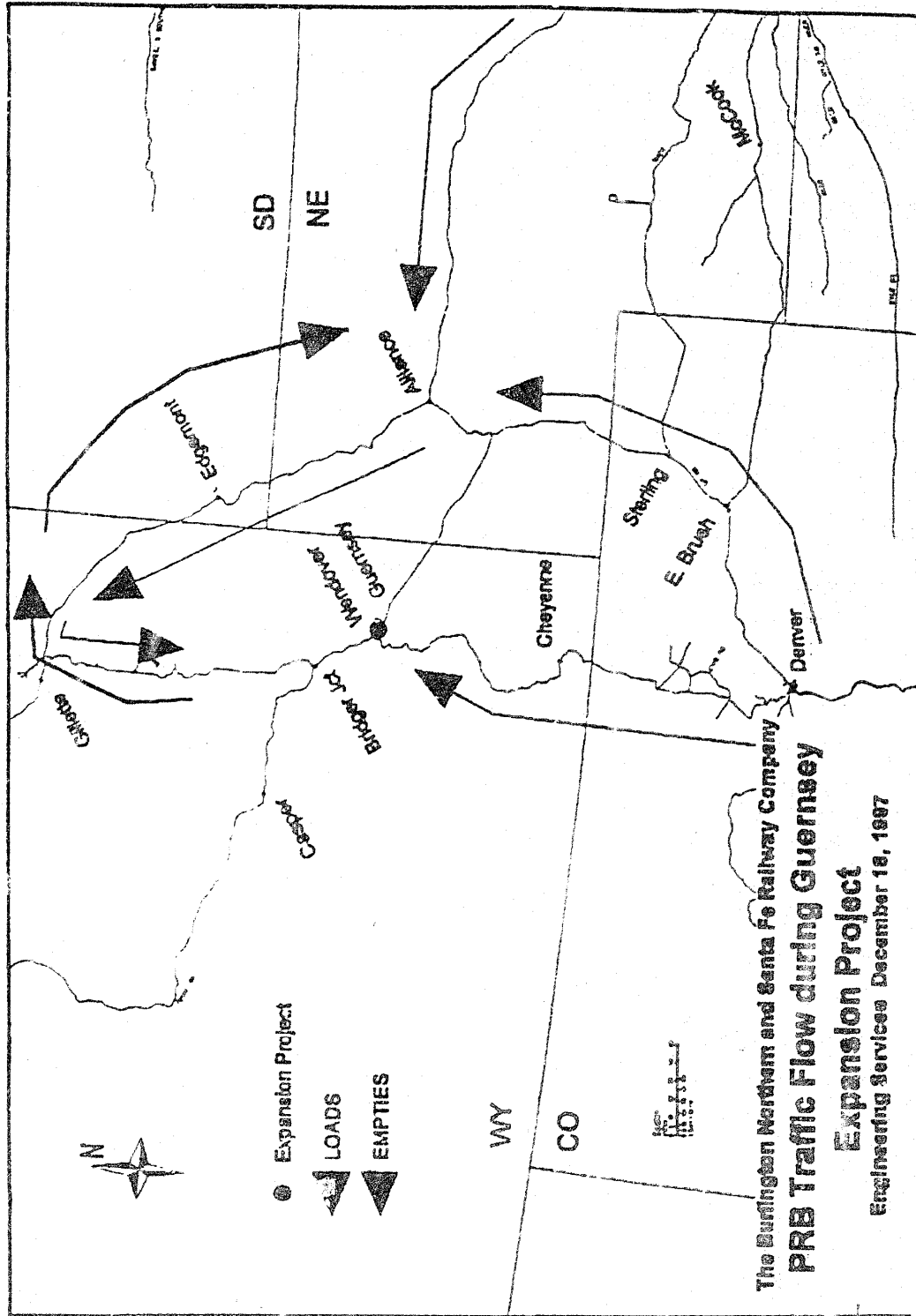


Thomas G. Kraemer

Enclosure

ATTACHMENT B

Axis Equal Area Projection (USGS) Source: Digitizing System Map R6



● Expansion Project

▲ LOADS

▲ EMPTIES

The Burlington Northern and Santa Fe Railway Company
PRB Traffic Flow during Guernsey

Expansion Project

Engineering Services December 18, 1987

BEFORE THE
SURFACE TRANSPORTATION BOARD

Review of Rail Access and Competition Issues	)	Ex Parte No. 575
	)	

COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE

PREFACE

On February 12, 1998, Senators John McCain and Kay Bailey Hutchison wrote a letter to the Surface Transportation Board ("STB"), asking the STB to conduct hearings on rail competition and access issues. In that letter, the Senators emphasized that "competition generally serves the public interest" and that "Congress has the responsibility to examine proposals that would appropriately and effectively remedy legitimate transportation problems."

The STB initiated the Ex Parte No. 575 proceeding in response to the McCain/Hutchison letter. See STB Ex Parte No. 575, Review of Rail Access and Competition Issues (Notice served February 20, 1998) ("Notice"). The STB has asked for "comments, data, studies and proposals for legislative action[]" concerning "issues of rail access and competition generally" Notice at 2,3. The Western Coal Traffic League ("WCTL") appreciates the opportunity to present responsive comments.

As the STB knows, WCTL has a long-held interest in promoting rail competition in the western coal transportation marketplace. WCTL agrees with Senators McCain and Hutchinson that competition in the rail transportation markets "generally serves the public interest." Our Comments are divided into two parts. Part One is a joint statement by two WCTL member company representatives: Mark Schwartz, Manager, Environmental & Fuel Resources for Arizona Electric Power Cooperative, Inc. ("AEP"), headquartered in Benson, Arizona, and Marguerite Mills, Director of Solid Fuels for Central and South West Services, Inc. ("CSW"), headquartered in Dallas, Texas. Part Two is our legal argument.

PART ONE
JOINT STATEMENT
OF
MARGUERITE MILLS
AND
MARK SCHWIRTZ
on behalf of
WESTERN COAL TRAFFIC LEAGUE

We are Marguerite Mills, Director of Solid Fuels, Central and South West Corporation, Dallas, Texas and Mark Schwirtz, Manager, Environmental and Fuel Resources, Arizona Electric Power Cooperative, Benson, Arizona. We appear in this important proceeding on behalf of the Western Coal Traffic League ("WCTL").

WCTL is a voluntary association whose membership is comprised exclusively of organizations which purchase and transport coal from origins west of the Mississippi River. Our members who are listed in our Exhibit ____ (WCTL-1) are some of our nation's largest shippers and consumers of coal. Our members currently transport over 95 million tons of coal annually, nearly all of which moves via railroad.

Since its formation in 1976, WCTL has been active continuously before the Surface Transportation Board and its predecessor, the Interstate Commerce Commission, in proceedings dealing with railroad issues of general transportation importance, especially those issues related to captive shippers. Each of our companies is a captive rail shipper and many other WCTL members own and operate one or more electric generating facilities which are captive to the transportation services of a single

railroad. Because it is a spokesman for the interests of captive shippers, WCTL took an active role in the Congressional hearings which culminated in both the Staggers Act and the ICC Termination Act as well as in the administrative proceedings in connection with such cases as Ex Parte 320, Special Procedures For Making Findings of Market Dominance as Required by the Railroad Revitalization Act of 1976; Ex Parte 338, Standards and Procedures For the Establishment of Adequate Railroad Revenue Levels; Ex Parte 445 (Sub-No. 1), Intramodal Rail Competition; and Ex Parte 347 (Sub-No. 1), Coal Rate Guidelines--Nationwide. In all of these legislative and regulatory proceedings, WCTL endeavored to champion positions which would spare captive coal shippers from economic exploitation by market dominant railroads. WCTL has enjoyed some successes in its efforts on behalf of captive shippers. For example, following initial failure, WCTL ultimately prevailed in its position that the Rail Cost Adjustment Factor (RCAF) needed to be adjusted to reflect rail productivity (Ex Parte 290 (Sub-No. 4), Railroad Cost Recovery Procedures--Productivity Adjustments). Similarly, WCTL participated actively in the proceedings which culminated in Ex Parte No. 347 (Sub No. 1), Coal Rate Guidelines-Nationwide. These rules have in turn offered significant rate relief to several captive western coal shippers including most recently West Texas Utilities, a CSW subsidiary.

While WCTL has made certain progress in improving the lots of captive coal shippers, the fact remains that their

captivity to rail carriers continues and therefore they continue to be exploited economically by coal carrying railroads. Proof of the accuracy of this statement is set forth in our Exhibit (WCTL-2). Solely as a consequence of their captivity, certain shippers pay significantly higher rail prices for their rail services than similarly-situated coal transportation consumers who enjoy intramodal rail competition. The disparity between the transportation costs of similarly-situated coal consumers is a matter of increasing concern to WCTL and its member organizations as deregulation moves forward in the electric utility industry. The cost of fuel is typically the largest single expense in the generation of electric power. Where captive generators must compete with generators enjoying rail competition in deregulated markets, the prospects of the captive generators are bleak unless they can access competitive transportation services. For these reasons, WCTL believes that the related issues of rail competition and competitive access are of national transportation importance and that the Board is well-advised in conducting these hearings. We welcome the opportunity to present our views on these issues to the Board. Before turning to these issues, a brief description of our respective involvements in rail transportation of coal is in order. They are more-or-less representative of our membership as a whole.

ARIZONA ELECTRIC POWER COOPERATIVE INC. ("AEP CO")

AEP CO is a rural electric cooperative which owns and operates a coal-fired, electric generating station in Arizona. AEP CO's electric plant is located on the lines of Union Pacific in Cochise, Arizona. Like many other western utilities, AEP CO began using coal as its primary source of fuel in the late 1970's following the Energy Crisis and the enactment of federal legislation prohibiting the use of natural gas for electric generation purposes. From the very outset, AEP CO's efforts to conserve oil and gas and to save money for its ratepayers by converting to coal were thwarted by the railroads who were intent upon maximizing their revenues from our captive coal traffic by exercising their monopoly powers. AEP CO's coal-fired units are served only by Union Pacific and the nearest rail competition is over 150 miles to the east where UP and BNSF join at Deming, New Mexico. Each year, AEP CO burns approximately 1.2 million tons of coal which it delivers in a fleet of company-owned equipment.

AEP CO's troubled history with the railroads is a familiar one to the Board. This history has seen the railroads seize upon every opportunity to squeeze additional revenues from AEP CO's coal traffic. Because of AEP CO's lack of effective competition, it has had to rely heavily upon rate regulation litigation in its efforts to obtain reasonable rates. See, e.g., Incentive Rate on Coal -- Gallup, New Mexico to Cochise, Arizona, 357 I.C.C. 683 (1977), aff'd sub nom. Houston Lighting & Power Company and Arizona Electric Power Cooperative, Inc. v. United

States, 606 F.2d 1131 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980); Docket No. 37437, Arizona Electric Power Cooperative, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, et al. ("AEPCO v. ATSF") (Decision served August 21, 1981); Docket No. 37437, AEPCO v. ATSF (Decision served March 30, 1982); Docket No. 37437, AEPCO v. ATSF (Decision served August 30, 1983); Docket No. 37437, AEPCO v. ATSF (Decision served April 10, 1986); Arizona Electric Power Cooperative, Inc. v. United States, 816 F.2d 1366, 1368 (9th Cir. 1987). The adverse interests that sparked this contentious history still exist today. AEPCO remains captive to Union Pacific and as a consequence of this captivity it pays a significant premium in its rail transportation costs.

CENTRAL AND SOUTH WEST CORPORATION ("CSW")

CSW Corporation is a publicly-owned company which trades on the New York Stock Exchange. Among its subsidiaries are four (4) separate United States power companies:

Central Power & Light Company ("CP&L")
Corpus Christi, Texas

Public Service Company of Oklahoma ("PSO")
Tulsa, Oklahoma

Southwestern Electric Power Company ("SWEPCO")
Shreveport, Louisiana

West Texas Utilities Company ("WTU")
Abilene, Texas

CSW Services is also a subsidiary of CSW and provides cost management, and other services to CSW and its four (4) electric utility company subsidiaries. Included within the services which CSW Services provides is the responsibility for the acquisition of fuel and fuel transportation for each of our domestic electric companies. CSW's annual domestic electric sales are approximately \$3 billion. Its electric revenues by state are approximately:

Texas	64%
Arkansas	6%
Louisiana	8%
Oklahoma	22%

We serve nearly two million customers and generate approximately 40 percent of our power from coal-fired facilities. Coal is therefore an extremely important energy source for our companies. Unfortunately, three of our electric company subsidiaries operate coal-fired plants which are captive railroad shippers. These plants consume nearly 14 million tons of coal annually all of which moves via railroad. Like our colleagues at AEPCO, CSW has engaged in a nearly continuous struggle with the railroads servicing our four captive facilities.

These struggles are recounted in some of the following case reports. I will not dwell on our railroad experiences here other than to state that CSW pays very high freight rates for coal transportation to each of these destinations because each destination lacks competition. See, e.g., Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co. (Deci-

sion served December 31, 1996). petition for review pending, Docket No. 91-1081, MidAmerican Energy Co. v. STB (8th Cir.); Docket No. 41191, West Texas Utilities Co. v. Burlington Northern R.R. (Decision served May 3, 1996), aff'd sub nom. Burlington Northern, Inc. v. STB, 114 F.3d 206 (D.C. Cir. 1997); In the Matter of the Arbitration Between Pub. Serv. Co. of Okla. And Burlington Northern R.R., Case No. 92-C-1196-E (N.D. Okla. Dec. 28, 1994) (confirming arbitration award), aff'd, Pub. Serv. Co. of Okla. v. Burlington Northern R.R., 1995 WL 640375, Docket No. 95-5017 (10th Cir. Oct. 20, 1995); Southwestern Electric Power Co. v. Burlington Northern R.R., 41 Tex. Sup. Ct. J. 529, 1998 WL 107920, Docket No. 96-0684 (Tex. March 13, 1998).

As our joint coal transportation experiences demonstrate, our companies have a long history of strife with monopoly railroads. Based upon our collective experiences, we know first hand the problems which captive railroad shippers face. As noted previously, these concerns take on new urgency as the electric industry becomes deregulated. Generators who fail to obtain their fuel supplies at competitive prices will fail. For these reasons, the Board's review of issues involving railroad access and competition are especially urgent.

In our appearances before the Board on April 2, 1998, we will supplement and amplify our actual experiences as captive railroad shippers. In the meantime, we need to summarize WCTL's position in this proceeding which the Board has characterized as "the overall debate about access and competition in the rail

industry." Because the details of this debate are primarily made up of legislative, legal, and regulatory issues, we have instructed our counsel to prepare a position paper for WCTL. WCTL's position is set forth in the legal argument and the accompanying attachments which immediately follow our joint testimony. In our testimony here, we offer a summary of the WCTL positions which are detailed and supported in our legal argument.

SUMMARY

Despite the pronouncement in the Staggers Act that the Congress desired to substitute competition for regulation in our national rail transportation policy, the Board and the ICC have, in many instances, used their regulatory authorities to insulate railroads from intramodal competition. Fortunately, for the rail shipping public, there have been exceptions to this policy in the rail construction field. Invariably, the actions of the Board and the ICC which have stifled intramodal rail competition have a common and erroneous root cause; namely, a flawed perception by the Board of the financial health of the nation's railroads. In the face of compelling, contrary proof (see Exhibit ____ (WCTL-3), the Board hews to its belief that the railroads it regulates lack adequate revenues. The Board has taken a series of missteps in its administration of the Interstate Commerce Act which missteps collectively have deprived numerous railroad transportation consumers including many of our members of the benefits of the railroad competition which the Congress mandated.

In our legal argument we explain with clarity and in detail why the Board is wrong in its recent Bottleneck Decision and why it was previously wrong in its construction and interpretation of the Competitive Access Provisions (49 U.S.C. § 11102). Much of the harm which the Board has done to captive shippers can be rectified by the Board through reconsiderations and revisions. A more equitable solution to the competitive access problems with which we are afflicted would require a modification of existing law. We propose such a modification in our accompanying analysis and we urge the Board to commend it to Senators McCain and Hutchinson.

We thank the Board for permitting us to appear and we look forward to our personal appearances on April 2, 1998.

Exhibit No. _____ (WCTL-1)

WESTERN COAL TRAFFIC LEAGUE

WCTL Members

Arizona Electric Power Cooperative, Inc.
Central Louisiana Electric Company, Inc.
Central and South West Services, Inc.
City Public Service Board of San Antonio
Colorado Springs Utilities
Fayette Power Project, Austin, Texas
Houston Industries, Inc.
Kansas City Power & Light Company
MidAmerican Energy Company
Minnesota Power
Nebraska Public Power District
Omaha Public Power District
Unitrain, Inc.
Western Resources, Inc.
Wisconsin Public Service Corporation

**DIFFERENTIAL IN WESTERN COAL RAIL
RATES WITH AND WITHOUT COMPETITION**
(Mills Per Revenue Ton-Mile)

<u>Category</u> (1)	<u>Moves Less Than 600 Miles</u> (2)	<u>Moves Greater Than 600 Miles</u> (3)
1. Competitive Moves	10.5	8.9
2. Captive Moves	28.8	13.2

Source: FERC Form 423 data and other publically available documents

Financial Health Of Major Class I Railroads

<u>Carrier/Measure</u> (1)	<u>1980 1/</u> (2)	<u>Current</u> (3)	<u>Percent Change</u> (4)
1. BNSF			
a. Return On Investment	5.8%	8.8%	52%
b. NROI (Millions)	\$173	\$1,100	536%
c. Return On Equity	8.75%	10.8%	23%
d. Debt as a Percentage Of Capital	36%	13%	-64%
2. UP			
a. Return On Investment	9.6%	8.2%	-15%
b. NROI (Millions)	\$214	\$1,000	367%
c. Return On Equity	10.3%	17.1%	66%
d. Debt as a Percentage Of Capital	26%	21%	-19%
3. NS			
a. Return On Investment	9.9%	12.5%	26%
b. NROI (Millions)	\$122	\$800	556%
c. Return On Equity	13.1%	13.5%	3%
d. Debt as a Percentage Of Capital	32%	10%	-69%
4. CSX			
a. Return On Investment	9.3%	8.9%	-4%
b. NROI (Millions)	\$71	\$600	745%
c. Return On Equity	9.3%	12.0%	29%
d. Debt as a Percentage Of Capital	19%	17%	-11%

1/ Values Represent BN (Line 1), UP (Line 2), Southern (Line 3) and C&O (Line 4)

VERIFICATION

STATE OF
COUNTY OF

}
} ss

I, Marguerite Mills, hereby certify, that I have read the foregoing testimony, know the contents thereof, and believe it to be true to the best of my knowledge and belief.

Dated this 26th day of March, 1998.

Marguerite Mills
Marguerite Mills

Subscribed and sworn
to before me this 26 day
of March, 1998

Janet Howard
Notary Public

My Commission expires: 1-29-2001



VERIFICATION

STATE OF ARIZONA
COUNTY OF COCHISE

)
) ss
)

I, Mark W. Schwartz, hereby certify, that I have read the foregoing testimony, know the contents thereof, and believe it to be true to the best of my knowledge and belief.

Dated this 25th day of March, 1998.


Mark W. Schwartz

Subscribed and sworn
to before me this 25th day
of March, 1998


Notary Public

My Commission expires: _____



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PART TWO

LEGAL ARGUMENT

SUMMARY

The Surface Transportation Board ("STB"), at the behest of Senators McCain and Hutchinson, has asked for public comments on "competition" and "competitive access." Since the enactment of the Staggers Act in 1980 ("Staggers Act"),¹ the Western Coal Traffic League ("WCTL") sees the major competition/access developments as follows:

- The number of rail carriers has shrunk dramatically. Western rail transportation is now a near duopoly between Burlington Northern Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP"). This reduction in carriers has reduced competition and service options for western coal shippers.
- The Interstate Commerce Commission ("ICC")/STB's revenue adequacy rules have produced a flawed financial portrait of rail carriers like BNSF and UP, and the other remaining mega-carriers. These carriers are financial titans, not the paupers they appear to be under the STB revenue adequacy tests.
- The ICC/STB has administratively gutted the competitive access provisions in the Staggers Act due, in principal measure, to its view that rail carriers must be insulated from access-produced competition in order to promote their revenue adequacy.
- The ICC/STB has also denied all requests to date for bottleneck rate relief -- relief that would also promote competi-

¹ Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

tion-driven ratemaking over non-bottleneck line segments.

- Unlike its actions in the competitive access and bottleneck rate cases, the ICC/STB has correctly approved many pro-competitive rail construction projects, including the Powder River Basin ("PRB") joint line.
- The STB's actions in mergers, access, bottleneck and construction cases have created a western coal transportation market where some shippers, through rail construction projects, enjoy origin-to-destination intramodal competition -- but face duopoly pricing and service. Shippers that cannot build access lines remain captive, pay higher rates, and appear to have little or no recourse under STB competitive access or bottleneck rate case holdings.
- WCTL asks the STB to reconsider and revise its anti-competitive access rules and bottleneck case holdings so that these remedies work. If the STB is unwilling to do so, or believes existing law prohibits the agency from doing so, the STB should so inform Senators McCain and Hutchinson, along with the shipping public.
- WCTL also proposes a modification to the Staggers Act that would allow increased competition through STB-supervised trackage rights and reciprocal switching.
- The relief WCTL seeks will increase competition. This relief uses limited and focused regulation to unleash the forces of intramodal rail competition.

I.

THE RAIL INDUSTRY TODAY IS
DOMINATED BY A
HANDFUL OF RAIL BEHEMOTHS

Just prior to the enactment of the Staggers Act in 1980, there were forty-two (42) major, Class I railroads.

Ninety-fourth Annual Report of the Interstate Commerce Commission, at App. E (Issued Apr. 4, 1981).² Since 1980, the number of Class I railroads has shrunk from 42 to nine. If the pending Conrail and Grand Trunk Western/CN/Illinois Central acquisitions are approved, the number of Class I railroads will be reduced from nine to seven. Those seven will be:

BNSF
CSX Transportation, Inc. ("CSX")
Illinois Central R.R./Grand Trunk Western R.R.
Kansas City Southern Ry.
Norfolk Southern Ry.
Soo Line R.R.
UP

² Among these 42 carriers were: Eastern District -- Baltimore & Ohio, Bessemer & Lake Erie, Boston & Maine, Chesapeake & Ohio, Conrail, Delaware & Hudson, Detroit, Tol. & Ironton, Elgin, Joliet & Eastern, Grand Trunk Western, Norfolk & Western, Pitt & Lake Erie and Western Maryland; Southern District -- Clinchfield, Florida East Coast, Illinois Central Gulf, Louisville & Nashville, Seaboard Coast Line and Southern System; and Western District -- Atchison, Topeka & Santa Fe ("Santa Fe"), Burlington Northern ("BN"), Chicago & Northwestern ("CNW"), Chicago, Milwaukee, SP & PAC, Colorado & Southern, Denver & Rio Grande W. ("DRGW"), Duluth, Mes. & Iron RNG, Fort Worth & Denver, Kansas City Southern, Missouri-Kansas-Texas, Missouri Pacific, St. Louis-San Francisco, St. Louis-Southwestern, Soo Line, Southern Pacific ("SP"), Union Pacific and Western Pacific. See Ex Parte No. 393, Standards for Railroad Revenue Adequacy, 364 I.C.C. 803, 826 (1981) ("Ex Parte No. 393").

The dramatic reduction in the number of major domestic rail carriers has been accomplished through ICC and STB approvals of rail mergers and other forms of rail consolidation. Since 1980, the ICC/STB has approved every major rail merger proposal presented to it, save one.³ Those approvals have included:

<u>Involved Railroads</u>	<u>Approval Date</u>
Grand Trunk Western; Detroit, Toledo & Ironton	1980
BN; St. Louis-San Francisco	1980
Chessie System; Louisville & Nashville; Seaboard Coast Line	1980
Grand Trunk Western; Detroit & Toledo Shore Line	1981
Guilford; Maine Central	1981
BN; Colorado & Southern; Fort Worth & Denver; Walla Walla Valley	1982
UP; Missouri Pacific; Western Pacific	1982
Norfolk & Western; Southern	1982
Guilford; Boston & Maine; Delaware & Hudson	1983
Soo Line; Chicago, Milwaukee, St. Paul & Pacific	1985
Denver & Rio Grande Western; Southern Pacific	1988
UP; Missouri-Kansas-Texas	1988

³ In 1987, the ICC did deny the proposed merger of the SP and the Santa Fe. However, the ICC subsequently approved BN's acquisition of the Santa Fe and the STB subsequently approved UP's acquisition of the SP.

CSX; Richmond, Fredricksburg & Potomac	1991
Canadian Pacific; Delaware & Hudson	1991
BN; Santa Fe	1995
UP; CNW	1995
UP; SP	1996

These mergers have had a significant impact on the national transportation market in general and the western coal transportation marketplace in particular. Today, the marketplace for western coal transportation is a virtual duopoly, dominated by two giant carriers: BNSF and UP.

WCTL opposed the combinations of BN and Santa Fe and UP and SP because we foresaw the loss of competition -- and rail service problems -- these two mergers would produce. WCTL presented extensive evidence on these issues in the BN/Santa Fe and UP/SP merger cases. Rather than repeating all of the material here, WCTL appends as Attachment 1 portions of its arguments in the UP/SP and BN/Santa Fe merger cases, which arguments summarize WCTL's extensive evidentiary presentations.

II.

THE STB HAS A MYOPIC VIEW OF THE FINANCIAL STRENGTH OF THE RAIL BEHEMOTHS

The 4-R Act called upon the ICC to promulgate standards to determine the financial health or, as it became known in

transportation parlance, the "revenue adequacy" of major railroads.⁴ The ICC proceeded to promulgate rules that called upon the agency to look at a variety of economic indicators to determine the financial health of railroads. See Ex Parte No. 338, Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels, 358 I.C.C. 844 (1978). WCTL supported this multi-factor approach.

Shortly after the Staggers Act was passed, the ICC changed its revenue adequacy rules in Ex Parte No. 393. The new rules abandoned the multiple indicator standard and substituted a single standard: a railroad would be considered revenue adequate only if its rate of return on net investment was equal to the current cost of capital.

WCTL actively participated in Ex Parte No. 393 and follow-up proceedings. WCTL opposed the Ex Parte No. 393 single standard rate base/rate of return for a number of reasons: the ICC's rate base/rate of return methodology produced absurd results -- the methodology showed financially vibrant carriers to be teetering on the edge of bankruptcy; the financial community did not look to the standards in their commercial dealings with the rail industry; and the methodology had significant internal flaws -- both the investment base and the rate of return were vastly overstated. The ICC chose to ignore WCTL's concerns and

⁴ See Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, § 205, 90 Stat. 31, 41 (1976).

the reviewing court deferred to the ICC's expertise in this complicated area. See Bessemer and Lake Erie R.R. v. ICC, 691 F.2d 1104 (3d Cir. 1982) (affirming Ex Parte No. 393 rules). WCTL appends as Attachment 2 one of its briefs in Ex Parte No. 393 (Sub-No. 1). That brief explains in greater detail WCTL's extensive criticisms of rate base/rate of return standard adopted by the ICC in Ex Parte No. 393.

The STB continues to apply the flawed Ex Parte No. 393 rate base/rate of return revenue adequacy standards. By way of simple example, BN, UP and CSX -- carriers that have been able to easily raise billions of dollars in the capital markets to fund rail mergers -- are considered "revenue inadequate" under the STB's standards.

Recently, Vice-Chairman Owen correctly observed that the STB's revenue adequacy standards produce "a mere illusion of a carrier's economic vitality." Ex Parte No. 552 (Sub-No. 1), Railroad Revenue Adequacy -- 1996 Determination at 2 (Decision served Aug. 28, 1997). In another decision, Vice-Chairman Owen noted the following forms of "incongruity" between the results of the STB's revenue adequacy standards and the reality of the rail marketplace:

- Class I freight railroads exceeded earnings per share estimates of independent financial analysts in 1995, they have posted sustained ton-mile growth over the past decade, and they have made remarkable and sustained productivity gains through rationalization of the work-force, fixed-plant and equipment.

- The president of the Association of American Railroads, which represents each of the Class I railroads party to this proceeding, repeatedly has spoken in public of "a new Golden Age" for railroads.

- A premium considerably in excess of market value is being bid for a portion of revenue-inadequate Southern Pacific by revenue-inadequate Conrail, while a premium considerably in excess of market value is being bid for the entirety of revenue-inadequate Southern Pacific by barely revenue-adequate Union Pacific.

- Revenue-inadequate Burlington Northern-Santa Fe has announced a extraordinary 1997 capital-expenditure budget of almost \$2 billion.

- Revenue-inadequate Conrail has increased its dividend in every year since its initial public offering in 1987.

- Since 1985, return on investment for Class I railroads has more than doubled, while return on equity nearly doubled and exceeded the industry's cost of capital in 1994.

Ex Parte No. 552, Railroad Revenue Adequacy -- 1995 Determination, (1) S.T.B.2d 167, 169-170 (1996) (footnote omitted).

At the time Vice-Chairman Owen made the above-quoted remarks in Ex Parte No. 552, two other sitting Commissioners (Chairman Morgan and then-Vice Chairman Simmons) also expressed their doubts about the reliability of the Ex Parte No. 393 standards:

Under the standards developed by the ICC through rulemaking, and transferred under the ICCTA to the Board, most railroads have historically been found to be revenue inadequate, even though the industry has substantially and steadily improved its perfor-

mance, as well as its standing in the financial markets.

Id., 1 S.T.B.2d at 169.

As a practical matter, the major rail carriers in the west (BNSF and UP), as well as those in the east, are financial titans -- notwithstanding the "official" STB findings to the contrary.

III.

THE ICC/STB'S ADMINISTRATION OF THE COMPETITIVE ACCESS PROVISIONS IN THE STAGGERS ACT HAS BEEN A FAILURE

The Staggers Act ushered in a new era in the railroad industry. Congress included various provisions in the Act designed and intended to promote the financial health and "revenue adequacy" of the rail industry. Those provisions included increased freedom to set prices; easier cancellation of joint rates; and relaxed line abandonment standards.⁵

As a quid pro quo for their increased pricing freedoms, Congress authorized the ICC to aggressively encourage and promote intra-rail competition through rail access relief: terminal trackage rights⁶ and reciprocal switching.⁷ Both forms of re-

⁵ See, e.g., Staggers Act §§ 201 (prices), 217 (joint rates) and 402 (abandonments). 94 Stat. at 1898-1900, 1916-25, 1941-42.

⁶ This form of access relief involves shared carrier use of the owning carrier's terminal facilities, including main line tracks, for a reasonable distance outside a terminal. The STB
(continued...)

relief are available when the STB finds the relief "practicable" and "in the public interest." See 49 U.S.C. § 11102.

Shortly after the Staggers Act was passed, shippers (and some small carriers) began to file requests asking the ICC to grant access relief. These cases involved shipping facilities that were captive to a single railroad, but which had nearby a second carrier that could compete with the incumbent carrier if terminal trackage rights, or reciprocal switching, were obtained on reasonable terms and conditions.

These early requests were initially granted by Commission Administrative Law Judges ("ALJ"), Review Boards and, in at least one instance, by the full Commission.⁸ These decision-

⁶(...continued)
has the power to order terminal trackage rights under 49 U.S.C. § 11102(a).

⁷This form of access relief involves one carrier switching another carrier's freight to and from a shipper's facilities via the switching carrier's line. The STB has the power to order reciprocal switching under 49 U.S.C. § 11102(c)(1).

⁸See, e.g., Finance Docket No. 29831, Western Kentucky Trucking Co., Inc., Louisville & Nashville R.R. and Ill. Central Gulf R.R. -- Reciprocal Switching Agreement (Decision served Nov. 1, 1982) (Review Board No. 3 grants reciprocal switching petition); Finance Docket No. 29908, Delaware & Hudson Ry. and New York Dep't of Transp. -- Exemption For Use of Terminal Facilities (Decision served Nov. 10, 1982) (Review Board No. 2 grants terminal facility petition); Finance Docket No. 29883, Universal Forest Products v. Seaboard Coastline R.R. (Decision served Nov. 12, 1982) (Review Board No. 1 finds entry of reciprocal switching agreement to be in the public interest); Finance Docket No. 29802, Delaware & Hudson Ry. v. Consolidated Rail Corp., 366 I.C.C. 845 (1982) (Review Board No. 3), aff'd by Commission, 367 I.C.C. 718 (1983) (granting reciprocal switching petition); Docket No. 39021, Midtec Paper Corp. v. Chicago & North Western Transp. Co. (Decision served Apr. 29, 1983) (ALJ grants terminal (continued...))

makers concluded that granting access relief fulfilled the public interest in promoting rail competition. As stated by one ICC ALJ in a 1983 decision:

The Judge fully agrees with the conclusions of [two ICC Review Boards] that the Congress intended through [access relief] to promote rail-to-rail competition by allowing shippers the means of obtaining the benefits of such competitive rail service in order to off-set to some degree the very substantial advantages which the Staggers Act gave to the rail carriers in an [sic] area of increased pricing flexibility.

See Midtec, at 12-13 (ALJ Decision served April 29, 1983).

Following these initial decisions, the railroad industry began an all-out assault on the competitive access front. The industry maintained that enforcing competitive access standards was contrary to the public interest in ensuring their "revenue adequacy" as measured by the ICC's Ex Parte No. 393 standards. The railroad industry's pleas, along with changes in the composition of the ICC membership, met a receptive ear at the "new" ICC. In the landmark Midtec case, the ICC, in a 4-to-3 decision, denied the request of a captive paper shipper to obtain access to a nearby second rail carrier via terminal trackage rights or reciprocal switching. Id., 1 I.C.C.2d 362 (1985), as superseded, 3 I.C.C.2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988). In Midtec, the ICC concluded that the public interest favored

⁸(... continued)
trackage rights and reciprocal switching petition). Several of these cited decisions were subsequently reversed by the ICC.

protecting railroads from intramodal competition -- competition that might hinder railroad efforts to obtain revenue adequacy. 1 I.C.C.2d at 369-70 (Chairman Taylor dissenting).⁹

Following Midtec, and the ICC's adoption of access rules in Ex Parte No. 445,¹⁰ no shipper has obtained any trackage rights or reciprocal switching access relief.¹¹ WCTL predicted this result in its Ex Parte No. 445 comments (copy appended in Attachment 3) and urged the ICC to adopt and apply a pro-competitive construction of its statutory access powers.

The legal deck in access cases clearly is now stacked against shippers and against competition. In its most recent shipper-initiated terminal trackage rights decision, the STB

⁹ Accord Universal Forest Products (Decision served June 23, 1983) (Division 1 reverses Review Board No. 1 order granting reciprocal switching on grounds, inter alia, that the Review Board failed to give "adequate weight" to the "revenue inadequacy" of the switching carrier in its public interest analysis); Docket No. 38891, Central States Enterprises, Inc. v. Seaboard Coast Line R.R. (Decision served May 15, 1984) aff'd sub nom. Central States Enterprises, Inc. v. ICC, 780 F.2d 664 (7th Cir. 1985) (Commission reverses the Review Board's decision granting reciprocal switching, inter alia, on grounds that Review Board "did not adequately weigh" the switching carrier's "revenue inadequacy" in its public interest analysis).

¹⁰ Ex Parte No. 445 (Sub-No. 1), Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd sub nom. Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987).

¹¹ See, e.g., Docket No. 41550, Golden Cat Division of Ralston Purina Co. v. St. Louis Southwestern Ry. (Decision served Apr. 25, 1996) (STB denies shipper request for terminal trackage rights); Shenango, Inc. v. Pittsburgh Chartiers and Youghiogheny Ry., 5 I.C.C.2d 995 (1989), aff'd sub nom. Shenango, Inc. v. ICC, 904 F.2d 696 (D.C. Cir. 1990) (ICC denies shipper request for terminal trackage rights); Vista Chemical Co. v. Atchison Topeka & Santa Fe Ry., 5 I.C.C.2d 331 (1989) (ICC denies shipper request for reciprocal switching).

referred to terminal trackage rights as a "drastic remedy." STB Docket No. 41987, Western Fuels Service Corp. v. Burlington Northern and Santa Fe Ry., at 7 (Decision served July 28, 1997). According to the STB, "[i]t is well settled" that a carrier's charging of supra-competitive rates is not conduct that "warrants a competitive access remedy under our regulations." Id. The ICC/STB has cited similar standards in dismissing post-Midtec reciprocal switching requests. See Vista Chemical, supra.

At the same time the STB has been denying all shipper-initiated competitive access requests, the Board recently has gone out of its way to grant carrier requests for access relief. In the UP/SP merger case, the STB held that the anti-access Midtec standards were not applicable when a large carrier (BNSF) asked for terminal trackage rights to use a second carrier's yard facilities. The STB opined in so ruling that its broad "public interest" authority allowed it to ignore the Midtec standards -- at least when large carriers file terminal access requests. See Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., at 168-69 (Decision served Aug. 12, 1996).

IV.

**THE STB'S BOTTLENECK
DECISION IS WRONG**

In December of 1996, the STB issued its Bottleneck Decision.¹² Therein, the STB dismissed complaints filed by three rail shippers asking the STB to prescribe maximum reasonable rates over bottleneck line segments.

Bottleneck relief is a pro-competitive remedy. With a bottleneck rate prescription in hand, a shipper can use the forces of competition to obtain market-driven, competitive rates over its non-bottleneck line segments.

WCTL filed extensive comments at the STB in the Bottleneck Decision. We also participated in the judicial review proceedings in the Eighth Circuit. Our opening brief in the Eighth Circuit summarizes the many reasons why the Bottleneck Decision is wrong. We will not repeat all those reasons here. Instead, we append a copy of that brief as our Attachment 4.

V.

**THE STB HAS PROPERLY USED
ITS RAIL CONSTRUCTION
AUTHORITY TO PROMOTE COMPETITION**

Shortly after the Staggers Act was passed, the ICC took actions to protect the CNW's position as a participant in a joint line construction project to access several Wyoming PRB mines,

¹² Docket No. 41242, Central Power & Light Co. v. Southern Pacific Transp. Co. (Decision served Dec. 31, 1996).

over the vehement objections of Burlington Northern -- which wanted to monopolize all PRB service. Finance Docket No. 28934, et al., Chicago and North Western Transp. Co. -- Construction and Operation of A Line of Railroad, 363 I.C.C. 906 (1981). The ICC emphasized in its 1981 decision that competition for coal transportation was a vital public interest:

The public interest requires that these coal resources be made available to consumers under the most favorable terms possible. Ensuring competition for the transportation of coal is the best means to guarantee that result.

Id., at 927.

In 1985, the ICC approved CNW's request to build a new rail line to access three additional PRB mines theretofore solely served by BN. The BN again strenuously opposed CNW's construction proposal. BN argued that the line construction, if approved, would cut into its monopoly profits, require it to raise rates elsewhere, and cause it other commercial harm. The ICC rejected BN's arguments, finding the public interest in competition outweighed BN's potential revenue losses. The ICC stated:

A railroad is an instrumentality of commerce that must earn and retain its traffic by providing efficient, effective, and competitive service. In addition, one of the cornerstones of the Staggers Rail Act of 1980 was the emphasis on increased railroad competition. Finally, BN has received handsome returns while it was the only railroad serving the PRB.

Finance Docket No. 29975, Chicago and North Western Transp. Co. -- Notes and Assumption of Obligations, 1985 ICC LEXIS 9, at *42

(Dec. 27, 1985) ("CNW Construction").

Opening up the southern PRB to two-carrier service increased western coal shippers' origin carrier choices in the mid-1980's to include:

<u>Producing Area</u>	<u>Principal Servicing Carriers</u>
Northern PRB	BN
Southern PRB	BN/CNW
Southern WY	UP
Colorado	DRGW
Utah	UP/DRGW
New Mexico	Santa Fe

Though western coal shippers in the mid-1980's had several origin carrier choices,¹³ most remained captive to a single carrier at destination. The ICC recognized in the 1985 CNW Construction decision "that destination monopoly carriers can have substantial power to control rates and service and would often have the economic incentive to use it." Id. at *46.

In light of the ICC's decision shutting off competitive access remedies, captive coal receivers had only one choice to break destination rail monopolies -- rail construction. In the past 15 years, several utilities, or carrier subsidiaries of utilities, have built new rail access lines to break their destination captivity. The ICC, and now the STB, has consistent-

¹³ The rail mergers since the mid-1980's have reduced the number of origin carriers serving the major western coal fields to two: BNSF and UP.

ly found that such rail construction projects promote the public interest in increasing rail competition.¹⁴

The ICC, and the STB, have also routinely approved petitions filed by carriers constructing new rail lines to cross the lines of incumbent carriers.¹⁵ In these cases, the ICC and the STB have rejected incumbent carriers' arguments that their potential loss of revenues requires rejection of the crossing rejection of the crossing, or the imposition of draconian crossing fees. As the STB observed in a 1996 crossing case decision:

[T]he rail transportation policy (RTP) found at 49 U.S.C. 10101a states that, in regulating the railroad industry, it is the policy of the United States Government "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; * * * and to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers * * * to meet the needs of the public * * *

We recognize that carriers in competitive markets are less able to price differentially than carriers in monopoly situations,

¹⁴ See, e.g., Finance Docket No. 32607, WEEC R.R. -- Constr. and Operation Exemption -- Chortaw and McCurtain Counties, Okla., at 6 (Decision served Sept. 1, 1995); Finance Docket No. 32321, Southern Gulf Ry. -- Construction Exemption -- In Calcasieu Parish, LA., at 2 (Decision served Sept. 9, 1993).

¹⁵ See, e.g., Finance Docket No. 32630, Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. § 10901(d), at 4 (Decision served Aug. 1, 1996); Finance Docket No. 32433 (Sub-No. 1), Chicago and North Western Ry. -- Constr. and Operation Exemption -- City of Superior, WI -- Petition for Issuance of An Order Pursuant to 49 U.S.C. 10901(d), at 4-5 (Decision served Aug. 11, 1995).

and that differential pricing is one way in which carriers can move toward revenue adequacy. But, while it was aware of the potential conflict between revenue adequacy and competition, Congress determined that the public would benefit from increased competition. Staggers Act Conference Report [H.R. Rep. No. 96-1430] at 114. Indeed, while it clearly sought to promote railroad earnings, Congress concluded that the best "way to attain revenue adequacy [was] by means of the interaction of competitive forces." American Short Line R.R. Ass'n v. United States, 751 F.2d 107, 113 (2d Cir. 1984).

Thus, we do not believe that we should administer the Congressional policy directing us to promote revenue adequacy at the expense of the clearly articulated policy, in the RTP . . . that we advance competition.

Omaha Pub. Power Dist. -- Petition Under 49 U.S.C. 10901(d), at 3-4.

The ICC's and STB's actions in the construction cases present a correct, pro-competitive reading of the Staggers Act.

VI.

SUMMARY OF THE CURRENT COMPETITION SITUATION IN THE WESTERN COAL TRANSPORTATION MARKETPLACE

The ICC's decisions to open up the southern PRB to two-carrier service, combined with ICC/STB decisions supporting construction of new rail access lines at utility destinations, have, when taken together, permitted some western coal-fired utilities to obtain origin-to-destination intramodal rail competition at their generating stations.

Utilities with two-carrier service have publicly reported that their rates have dropped significantly from their prior captive levels.¹⁶ However, today, western coal shippers with two-carrier service face a duopoly: their competition pits BNSF against UP. Duopoly competition, as WCTL has emphasized in the UP/SP and BNSF mergers, is fraught with the potential for pricing abuses and service shortages.

Duopoly pricing concerns are heightened by the 1984 ETSI decision.¹⁷ In ETSI, the major western railroads were found to have conspired, in violation of the antitrust laws, to keep out a new entrant -- the ETSI coal slurry pipeline. ETSI teaches that western railroads have colluded in the past when they felt sufficiently threatened. Collusion fears are heightened today. The many post-ETSI merger decisions have reduced the number of western carriers -- making collusion easier today.

¹⁶ For example, City Public Service Board of San Antonio, Texas ("CPSB") was captive for years to a BN/SP PRB-to-plant coal haul. CPSB reported in 1984 that its ability to obtain a CNW/UP alternative for its PRB-to-plant haul produced a \$24 million annual reduction in its coal freight charges. See CNW Construction, 1985 ICC LEXIS 9, at *40. Houston Lighting & Power Company ("HLP") provides a second example. HLP's Parish Station was exclusively served by Santa Fe. HLP recently completed construction of a new rail spur that permits UP to serve Parish. HLP can now receive southern PRB coal shipments from two carriers: UP direct or BNSF direct. HLP publicly reported that the resulting competition will reduce its coal freight charges by approximately \$10 million per year, which savings may increase to \$50 million annually starting in the year 2000. See Wall St. J., at A1, A10 (Feb. 6, 1998).

¹⁷ See ETSI Pipeline Project v. Burlington Northern, Inc., Civil Action No. B-84-979-CA, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex., Jan. 5, 1989).

Duopoly service is another problem. Having coal service transportation options is of marginal value where one of the two railroads is experiencing serious service problems, and the second carrier does not have the capacity to provide alternate service, or chooses to offer only premium pricing for emergency services.

Shippers that do not enjoy two-carrier service (because they are captive at origin or destination, or both, to a single rail carrier) face worse problems. These shippers in many instances have no "build" option to break captivity through line construction. The ICC/STB has slammed the door on any access relief for these shippers. Similarly, the STB has denied them bottleneck rate relief. The STB's message to date in access cases and bottleneck cases is clear: the agency will not help shippers break their captivity, except in cases where a shipper can build its way out of captivity.

The consequence of the ICC/STB policy is that a two-tiered rate structure exists for western coal shippers. Coal shippers with origin-to-destination competition have competition-driven rates. Coal shippers without such limited competition pay substantially higher rates. This spread in rates between the "have competition" utilities and the "have no competition" utilities has created substantial dissatisfaction among the "have not" utilities. In addition, utilities with competition in the west are extremely wary of the duopoly they now face.

Clearly, action can and should be taken to increase competition in the western coal transportation marketplace.

VII.

PROPOSALS TO INCREASE COMPETITION

A. Reform the Access Rules.

The STB should modify the current competitive access rules so that they work to promote competition. The fact that no shipper has been able to obtain any ICC-prescribed access relief through trackage rights or reciprocal switching since the 1985 Midtec decision provides graphic proof that the ICC/STB's administration of these standards has failed.

The STB clearly has the authority to modify its statutory construction, and its regulations, to deal with changed circumstances,¹⁸ and circumstances have changed dramatically in the rail industry since 1980. The number of major rail carriers has diminished from 42 to nine, and shortly may go to seven. In

¹⁸ As the Supreme Court has observed:

[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.

American Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 416 (1967). Similarly, the ICC has observed that "ineffective . . . regulations should be modified or rescinded when they fail to contribute to sound policy and the fulfillment of the legislative mandate." Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules, and Practices, 362 I.C.C. 844, 849 (1980).

the west, there is a near rail duopoly. Concentration in the rail industry is now at an all-time high.

Moreover, the ICC in effect changed course in the early 1980's -- going from a correct to an incorrect position on reciprocal switching and terminal trackage rights -- due in large measure to its reliance on what all now recognize are the totally flawed ICC/STB revenue adequacy guidelines. The few remaining large carriers should be required to compete -- not be shielded from competition.

In light of these developments, WCTL urges the STB to repeal the Midtec-inspired Ex Parte No. 445 rules (insofar as they deal with access prescriptions), and issue a policy statement stating that in future cases, it will reinstate the pro-access principles embodied in the initial post-Staggers Act access decisions¹⁹ and advocated by WCTL in its Ex Parte No. 445 Comments, appended as Attachment 3.

If the STB is unwilling to grant, or believes existing law precludes it from granting, WCTL's request, the STB should so inform Senators McCain and Hutchison, along with the shipping public.

¹⁹ These cases are cited, supra, at fn. 8. WCTL further notes, as discussed above, that the STB did not apply its Midtec/Ex Parte No. 445 rules in granting access relief to BNSF in the UP/SP merger case.

B. Correct the Bottleneck Decision.

The Bottleneck Decision is wrong. The Decision also hurts competition. The STB has maintained that its Bottleneck Decision is mandated by law. WCTL urges the STB to reconsider its legal position. If the STB will not, or believes it cannot do so under existing law, WCTL requests that the Board so inform Senators [redacted] and Hutchison, along with the rail shipping community's position.

S. 429, the Railroad Shipper Protection Act of 1997, a bill introduced last November by Senators Jay Rockefeller, Conrad Burns and Byron Dorgan, calls for Title 49 changes to, inter alia, legislatively repeal the STB's errant Bottleneck Decision. WCTL supports this bill.

C. Change Title 49 Access Remedies.

Title 49 now provides for reciprocal switching and terminal trackage rights access remedies. These remedies may provide no relief -- even if properly administered by the STB -- in many situations. Switching can only be ordered when it is "practicable," and terminal trackage rights can be prescribed only for shared use of rail lines within "reasonable" distance of rail terminal areas. See 49 U.S.C. § 11102.

Shippers whose geographical situation is such that terminal trackage rights or reciprocal switching will not work need a new access remedy. That remedy could take the form of a new statutory provision that allows the STB to prescribe trackage

rights or reciprocal switching, upon request and at reasonable fees, any time where such prescription would be operationally feasible. WCTL appends as Attachment 5 proposed legislative language to achieve this objective, along with a brief synopsis of the key terms.

Congressional action of the type proposed by WCTL would be consistent with general pro-competitive principles. For coal shippers, competition means the ability to obtain origin-to-destination service from competing origin-to-destination rail carriers or carrier combinations. Many coal shippers' geographical captivity at destination is such that obtaining competitive service through construction of a rail line to a second access carrier is economically impossible. Similarly, shippers served by only two carriers (or carrier combinations) may not be able to physically create any additional competition through rail construction. The only way for these shippers to obtain competition, or increased competitive choices, is through shared use of existing rail facilities.

WCTL's proposal is consistent with the antitrust law essential facilities doctrine. That doctrine traces its roots back to a 1912 railroad case. United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912).²⁰ In Terminal Railroad, the Supreme

²⁰ See Daniel E. Troy, Note, Unclogging The Bottleneck: A New Essential Facility Doctrine, 83 Colum. L. Rev. 441, 449 (1983) (citing United States v. Terminal Railroad Ass'n as "[t]he first essential facility case"). As described by the Seventh Circuit:

(continued...)

Court found that certain rail line facilities in St. Louis could not economically be duplicated and directed the owner of those facilities to open them up to shared use by competitors. Id. at 405. Most rail lines today are essential facilities and the only way to achieve competitive service via those facilities is through expanded access relief of the type proposed here by WCTL.

Our access proposals are intended to increase intramodal rail competition. We recognize that changing Title 49 is a topic that all concerned -- railroads, shippers and the Congress -- need to study and examine. WCTL is willing to consider any other reasonable legislative alternatives that will have our desired effect -- increasing intramodal rail competition.

²⁰ (...continued)

The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

MCI Communications Corp. v. American Tel. and Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983) (citations omitted).

VIII.

**WCTL'S PRO-COMPETITIVE PROPOSALS
ARE NOT RE-REGULATORY, NOR ARE
THEY UNFAIR TO THE RAIL INDUSTRY**

The rail industry usually argues that any form of rail access relief, whether it be enforcing the Staggers Act access provisions in a pro-competitive manner, or modifying Staggers Act access relief, is "re-regulatory." Similar arguments are made where bottleneck rate relief is sought. Those arguments are wrong.

Increased access promotes competition. Promoting competition -- not protecting rail monopolies -- lies at the heart of the Staggers Act. This view was well summarized by Seventh Circuit Judge Cudahy in his dissenting opinion in the Central States case. In Central States, the ICC denied a shipper (Central States) request for reciprocal switching or terminal trackage rights over a Seaboard System rail line. The Seventh Circuit affirmed the ICC's denial, in a 2-to-1 panel decision. In his dissent, Judge Cudahy stated:

I cannot believe it was the intent of Congress in the Staggers Act to protect the revenues of a particular railroad by refusing to liberate its "captive" shippers in situations where competition would otherwise be appropriate. Here the Commission apparently seeks to maintain or enhance the Seaboard's revenues by forcing unnecessary and uneconomic costs on Central. This sort of effort to protect what is called the public interest by restraining competition in the interest of particular carriers and against the interest of shippers is reminiscent of the "bad old

days" before deregulation sought to unleash market forces.

780 F.2d at 683.

Similarly, former STB Vice-Chairman Simmons observed in his dissent in the Midtec case:

Prior to the Staggers Rail Act, rates on shipments of similar commodities moving from one region to another tended to be equalized. The Commission had within its power the authority to strike any rate complained of and entertain claims of discrimination between railroads' customers. As a result of the Staggers Act, rail carriers now have substantial ratemaking and routing flexibility. In exchange for this freedom, the Act dictated that we liberalize use of reciprocal switching agreements and terminal trackage rights as a means of providing shippers with competitive opportunities. In reducing the use of the rate complaint as leverage, shippers were given the opportunity to enjoy liberal competitive access. This compromise, or trade-off if you will, is at the heart of the Staggers Act. Consequently, our rules and policies should not be used as barriers to restrict competitive access.

3 I.C.C.2d at 186.

The railroad industry also has argued that access and bottleneck relief is unfair and because it may bankrupt the rail industry. This claim is absurd. Access and bottleneck relief will force reluctant rail monopolists to compete. Competition-driven coal transportation rates will not bankrupt the rail industry. Actual experience demonstrates that competitively-set coal transportation rates generate substantial profits for the involved carriers. See WCTL's Comments in the Bottleneck Case.

Verified Statements of Thomas D. Crowley and Dr. George H. Borts
(appended hereto as Attachment 6).

CONCLUSION

WCTL again thanks the Board, and Senators McCain and
Hutchison, for the opportunity to address important competition
and access issues.

Respectfully submitted,

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ATTACHMENT C

BEFORE THE
HOUSE COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
SUBCOMMITTEE ON RAILROADS
HON. BOB FRANKS, CHAIRMAN

STATEMENT OF
THOMAS D. CROWLEY
ON BEHALF OF
THE WESTERN COAL TRAFFIC LEAGUE

HEARING ON THE CONDITION OF THE RAILROAD INDUSTRY

APRIL 22, 1998

Mr. Chairman, Members of the Subcommittee:

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L.E. Peabody & Associates, Inc. I have devoted a substantial portion of my professional career to railroad transportation matters. I append in Appendix A my Statement of Qualifications. That statement describes in detail my experience and expertise in the areas of rail transportation in general, and coal transportation in particular.

One of our firm's clients is the Western Coal Traffic League ("WCTL" or "League"). WCTL is an association comprised of

electric utilities that purchase and pay for the transportation of coal mined west of the Mississippi River. WCTL Members are listed in Appendix B to this statement. WCTL members currently ship in excess of 95 million tons of western origin coal yearly and their delivered coal costs are approximately \$2 billion annually. Since its formation in 1976, WCTL has actively participated in all major regulatory, judicial, and congressional proceedings involving western coal transportation.

I have been asked by WCTL to provide the Subcommittee with my views on the condition of the railroad industry. As this is a broad subject, I will address a few selected topics.

A. RAIL INDUSTRY CONCENTRATION
IS AT AN ALL-TIME HIGH

Since 1980, when the Staggers Act was passed, the Interstate Commerce Commission ("ICC") and its successor, the Surface Transportation Board ("STB"), have approved numerous rail mergers and other forms of rail acquisition. These approvals have included:

<u>Involved Railroads</u>	<u>Approval Date</u>
Grand Trunk Western; Detroit, Toledo & Ironton	1980
Burlington Northern ("BN"); St. Louis-San Francisco	1980
Chessie System; Louisville & Nashville; Seaboard Coast Line	1980
Grand Trunk Western; Detroit & Toledo Shore Line	1981
Guilford; Maine Central	1981

BN; Colorado & Southern; Fort Worth & Denver; Walla Walla Valley	1982
Union Pacific ("UP"); Missouri Pacific; Western Pacific	1982
Norfolk & Western; Southern	1982
Guilford; Boston & Maine; Delaware & Hudson	1983
Soo Line; Chicago, Milwaukee, St. Paul & Pacific	1985
Denver & Rio Grande Western; Southern Pacific ("SP")	1988
UP; Missouri-Kansas-Texas	1988
CSX; Richmond, Fredricksburg & Potomac	1991
Canadian Pacific; Delaware & Hudson	1991
BN; Atchison, Topeka & Santa Fe ("SF")	1995
UP; Chicago & Northwestern	1995
UP; SP	1996

As a consequence of these mergers, rail industry concentration is at an all-time high. For example, transportation of coal in the west is a virtual duopoly, with BNSF and UP controlling almost one hundred percent (100%) of coal originating in the western United States.

This level of concentration is illustrated using the Herfindahl-Hirschman Index ("HHI"). HHI is a standard used by the Department of Justice ("DOJ") to measure market concentration in mergers. By DOJ standards, an HHI greater than 1,800

signifies a highly concentrated market.¹ A market with a total duopoly would produce a 5,000 HHI. The HHI in the western coal marketplace, after the UP/SP merger, stands at 4,831.²

Eastern rail transportation is also far more concentrated today than it was in 1980. Indeed, if pending mergers are approved by the STB, rail transportation in the United States will be dominated by four (4) "mega" carriers: BNSF, UP, CSX and Norfolk Southern ("NS").

B. THE REMAINING MEGA-CARRIERS
ARE REAPING HUGE PROFITS

The rail industry has benefitted tremendously from the post-Staggers Act mega-mergers, and the industry's aggressive use of pricing and service freedoms accorded to it under the Staggers Act. I append in Appendix C a sampling of rail financial indicators comparing the financial position today of the four mega-carriers (BNSF, UP, NS and CSX) with the financial position of the 1980 iteration of these companies. These figures show that return on investment, net railroad operating income, and return on equity have soared since 1980, while debt as a percentage of capital has dramatically decreased. The financial power of the rail industry is further underscored by the industry's clout in the financial markets. UP, BNSF, CSX and NS

¹Horizontal Merger Guidelines, 57 FR 41552 (September 10, 1992).

²The development of this index figure is described in detail in my Verified Statement submitted as part of NCTL's March 29, 1996 Comments in the UP/SP merger case, Finance Docket No. 32760.

have had no trouble raising billions of dollars on Wall Street to finance their mergers.

In 1996, STE Vice-Chairman Owen made the following comments about the financial vitality of the rail industry:

- Class I freight railroads exceeded earnings per share estimates of independent financial analysts in 1995, they have posted sustained ton-mile growth over the past decade, and they have made remarkable and sustained productivity gains through rationalization of the work-force, fixed-plant and equipment.

- The president of the Association of American Railroads, which represents each of the Class I railroads party to this proceeding, repeatedly has spoken in public of "a new Golden Age" for railroads.

- A premium considerably in excess of market value is being bid for a portion of Southern Pacific by Conrail while a premium considerably in excess of market value is being bid for the entirety of Southern Pacific by Union Pacific.

- [B]urlington Northern-Santa Fe has announced a extraordinary 1997 capital-expenditure budget of almost \$2 billion.

- [C]onrail has increased its dividend in every year since its initial public offering in 1987.

- Since 1985, return on investment for Class I railroads has more than doubled, while return on equity nearly doubled and exceeded the industry's cost of capital in 1994.

Ex Parte No. 552, Railroad Revenue Adequacy -- 1995 Determination, 1 S.T.B.2d 167, 169-170 (1996) (footnote omitted).

I agree with Vice Chairman Owen's observations.

C. INCREASED CONCENTRATION HAS LED TO
DECREASED COMPETITION BETWEEN RAIL
CARRIERS AND SERVICE FAILURES

From an economic perspective, markets which are highly concentrated exhibit less competition. In a highly concentrated market, a seller can take various actions to avoid competition. The avoidance of competition can take several forms: overt collusion, conscious parallelism, or mere recognition of oligopolistic interdependence. In my opinion, the many post-Staggers Act rail mergers will not increase competition and, in all probability, will lead to the avoidance of price competition in both the west and the east.

Recent history in the western coal transportation markets teaches that western rail carriers have colluded when it suited their collective purposes, as is evidenced by the ETSI litigation.³ In the ETSI litigation, a Texas court concluded several major western railroads had actively colluded in violation of the antitrust laws to prevent ETSI from constructing a coal slurry pipeline. That pipeline, if it had been built, would have provided many western coal shippers with a competitive alternative to rail transportation from the Powder River Basin of Wyoming to their generating stations.

The railroad industry has maintained that, despite increases in concentration, average industry revenues per ton-mile have decreased since the Staggers Act became law in 1980, so

³ETSI Pipeline Project v. Burlington Northern, Inc., Civil Action No. B-84-979-CA, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex., Jan. 5, 1989).

rail shippers should have no concerns about the current concentrated state of the rail industry. The railroads' argument is misleading. Average revenue per ton-mile has decreased since 1980. However, the rail industry has not willingly made rate reductions. Actual rate reductions that western coal shippers have obtained have been the result of actions vigorously opposed by the rail industry or individual members thereof, including the opening of the southern Powder River Basin, Wyoming coal fields to two-carrier service (opposed by BN); the development and application of the ICC/STB's Coal Rate Guidelines (opposed by the major railroads); and the construction (or threats to construct) second carrier access lines at captive utility generating stations (usually opposed by the incumbent rail carriers).

Today, some western coal shippers -- through hard-fought efforts -- enjoy competitive origin-to-destination rail service.⁴ As shown in Appendix D, the difference in pricing levels between coal shippers with and without competition is dramatic. For example, for shorter movements (under 600 miles), captive coal shippers⁵ pay rates are almost three times higher than rates on competitive movements.

Rail mergers have also caused substantial service disruptions. Today, the most obvious case in point is the UP/SP

⁴Origin-to-destination competition refers to a shipper's ability to transport coal from origin to destination by two or more different rail or rail/barge transporters.

⁵Captive coal shippers refers to coal shippers that must use a single rail carrier for some or all of their haul.

merger. That merger, which WCTL opposes, has produced huge service disruptions throughout the west. "Bigger" is not necessary "better" when it comes to providing service to the customer. The meltdown of the UP/SP network has caused severe problems for WCTL members.

WCTL members Lower Colorado River Authority ("LCRA") and the City of Austin, Texas ("Austin") service problems provide a representative example. LCRA/Austin are joint owners of the Fayette Power Project ("FPP"). The FPP, located near LaGrange, Texas, burns approximately 6.5 million tons of coal annually originating in the Southern Powder River Basin of Wyoming. UP transports this coal. WCTL reported to the STB last October that UP's deficient service had required LCRA/Austin to curtail coal burns at a cost to LCRA/Austin of over \$8 million:

FPP normally maintains a 50 to 60 day supply of coal in its coal stockpile. Unfortunately, because of the UP's deficient service, UP has delivered to the FPP approximately 750,000 fewer tons than requested this year under the UP/LCRA rail transportation contract. The result is that both FPP partners, the City of Austin and LCRA have been required to curtail their coal burns at FPP due to the low stockpile of coal inventory on hand. In the absence of such curtailments, the stockpile would be exhausted, or very close to exhausted today. The additional cost to the City of Austin and LCRA for generation of power with more expensive substitute fuels and for purchased power is approximately \$8 million to date. For each trainload of coal that must be offset with non-coal fired generation or power purchases, the additional cost ranges from approximately \$400,000 to over \$500,000.

WCTL Comments in Ex Parte No. 573, Rail Service in the Western

United States, at 8 (filed October 23, 1997).

Overall, WCTL estimated earlier this year that UP's service deficiencies had caused its members to incur "tens of millions of dollars" in additional costs:

In the aggregate, UP's service problems have caused tens of millions of dollars in added costs for WCTL members, who have been forced to turn to much more expensive fuels and/or purchased power to make up for the coal delivery shortfalls caused by UP's deficient service. WCTL members' coal inventories continue to be too low. While members had hoped to have discontinued expensive coal displacement/replacement strategies by now, they have been forced to continue such strategies as a result of UP's continuing service problems and the need to try to rebuild stockpiles for the summer peak demands.

WCTL Comments in Ex Parte No. 573, Rail Service in the Western United States, at 11 (filed February 20, 1998).⁶

UP's post-merger service problems continue. These problems affect not only coal shipments but virtually all commodity shipments on the UP. The merger of the UP and SP, as a recent Wall Street Journal report aptly observed, has led to "the largest shipping breakdown in U.S. rail history." Wall Street Journal at A3, February 27, 1998.

⁶WCTL has also emphasized in its filings in Ex Parte No. 573 that current western rail service problems have not been limited to UP customers, as UP's service problems have spilled over to BNSF coal transportation operations, as well. See id. at 11-12.

D. INCREASING COMPETITION.

As this Subcommittee is undoubtedly aware, many rail shippers, including WCTL, support increased rail competition. WCTL recently filed comments in the STB's Ex Parte No. 575 proceeding urging the STB to promote intramodal competition. WCTL specifically asked the STB to overturn its Bottleneck Decision, and to modify its competitive access regulations to allow increased use of terminal trackage rights and reciprocal switching. WCTL also presented a legislative proposal requesting the congressional amendment of Title 49 to allow increased competitive access, on a case-by-case basis, under STB supervision. WCTL's Comments in Ex Parte No. 575, Review of Rail Access and Competition Issues (filed March 26, 1998).

The railroad industry has attacked proposals put forward by WCTL, and others, to increase competition. The railroads argue that increasing competition will destroy the gains made by the industry after the Staggers Act, prevent the industry from having sufficient revenues to invest in infrastructure, and ultimately bankrupt the industry.

I disagree. Increasing competition will not kill the rail industry. There is nothing intrinsic in the economic structure of the rail industry that prevents the industry from surviving in a competitive marketplace. If captive traffic is opened to competition, railroads will exist in a marketplace that is made up of the following four economic conditions:

Efficiency - By incorporating efficiencies into its operations, a railroad will maintain and possibly enhance its market share. The inefficient railroad will be replaced by a more efficient entrant into the rail market.

Cross Subsidy - The existing railroads will have to be more aware of their cost of providing service when setting rates in order to avoid and/or eliminate traffic that they currently handle at rate levels that are below costs.

Profit Maximization - The existence and cost structure of the inter-/intramodal competitors will have to be understood in order for a railroad to maximize profits on existing traffic that it handles and in order to maintain or enhance its market share. Stated differently, as rail rates decline volume should increase which translates to increased market size for the rail industry.

Competition - A firm will enter a market when generated revenues (rates) are sufficient to cover its costs, attract capital and provide a sufficient return to its stockholders. A firm will exit a market when the opposite is true.

Moreover, today's rail industry is generally viewed as having two distinct parts, i.e., the large Class I railroads and the so-called "shortline" operators. Each part of the rail industry evaluates road and equipment property investment in a similar manner. Since before the Staggers Act, the large Class I railroads have either abandoned economically unwanted or unneeded roadway track and related facilities, or sold them to shortline operators. The net result is a rail industry that is made up of a few large, efficient rail systems and a number of smaller, efficient connecting shortline railroads.

In the rail industry, investment in equipment is portable or transferable, i.e., locomotives, cars, etc. can be readily moved between goods and services. There is no economic incentive for a railroad to maintain road or equipment property assets on its books that are not needed or do not provide an adequate return on investment. Therefore, in the normal course of doing business, the railroads are already shedding economically unwanted and unneeded assets.

My actual experience in the coal transportation marketplace confirms that competition will not bankrupt the rail industry. BNSF and UP compete on some coal movements originating at mines located in the Powder River Basin of Wyoming. I have seldom seen rates for this "competitive" traffic fall below 160 percent of the carrier's variable costs. Rates that exceed costs by 60 percentage points reap large returns for the involved carriers, earning them substantial monies to invest in infrastructure and to pay a competitive return to their shareholders.

In summary, increased competition will not bankrupt the railroad industry; it will simply make railroads compete, rather than allowing them to continue to exploit captive shippers.

* * * *

On behalf of WCTL, I thank the Subcommittee for the opportunity to participate in this important hearing.

STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering Association.

The firm of L. E. Peabody & Associates, Inc. specializes in solving economic, marketing and transportation problems. As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United

STATEMENT OF QUALIFICATIONS

States. The nature of these studies enabled me to become familiar with the operating and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected both railroad terminal and line-haul facilities used in handling various commodities, and in particular unit train coal movements from the Powder River Basin to various utility destinations in the midwestern and western portion of the United States. These field trips were used as a basis for the determination of the traffic and operating characteristics for specific movements of coal, both inbound raw materials and outbound paper products to and from paper mills, crushed stone, soda ash, aluminum, fresh fruits and vegetables, TOFC/COFC traffic and numerous other commodities handled by rail.

I have presented evidence before the Interstate Commerce Commission ("ICC") in Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines - Nationwide which is the proceeding that established the methodology for developing a maximum rail rate based on stand-alone costs. I have submitted evidence applying the ICC's stand-alone cost procedures in "Coal Trading,"^{1/} "DP&L,"^{2/} "Westmoreland"^{2/}, and WTU^{3/} along with other proceedings before the ICC.^{3/}

^{1/} ICC Docket No. 38301S, Coal Trading Corporation v. Baltimore & Ohio Railroad, et al., ("Coal Trading").

^{2/} ICC Docket No. 38025S, The Dayton Power and Light Company v. Louisville and Nashville Railroad Company ("DP&L").

^{3/} ICC Docket No. 38301S (Sub-No. 1), Westmoreland Coal Sales Company v. Denver and Rio Grande Western Railroad Company, et al., ("Westmoreland").

^{4/} STB Docket No. 41191, West Texas Utilities Company v. Burlington Northern Railroad Company ("WTU").

^{5/} ICC Docket No. 40224, Iowa Public Power and Light Company v. Burlington Northern Railroad Company; ICC Docket No. 37029, Iowa Public Service Company v. Burlington Northern, Inc.; ICC Docket No. 39386, The Kansas Power and Light Company v. Burlington Northern Railroad Company and Union Pacific Railroad Company; ICC Docket No. 38783, Omaha Public Power District v. Burlington Northern Railroad Company; Docket No. 36180, San Antonio, Texas, Acting By and Through Its City Public Service Board v. Burlington Northern Railroad Company, et al.; ICC Docket No. 41185, Arizona Public Service Company and PacifiCorp v. The Arizona, Tuzigoot and Santa Fe Railway Company ("APS").

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Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the ICC for the development of variable costs for common carriers, including Burlington Northern Railroad Company,^{6/} with particular emphasis on the basis and use of Rail Form A. I have utilized Rail Form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.^{7/}

I have also analyzed in detail, the Uniform Railroad Costing System ("URCS") and presented the results of my findings to the ICC in Ex Parte No. 431, Adoption of the Uniform Railroad Costing System for Determining Variable Costs for the Purposes of Surcharge and Jurisdictional Threshold Calculations. I have been involved in the URCS process, either directly

^{6/} The following two (2) cases are examples of litigation before the ICC where I developed and presented Burlington Northern Railroad Company's variable costs of handling unit coal trains. These two cases involve the most detailed examination of the variable cost of moving coal in unit train service of any proceeding thus far brought before the ICC. The first example involved the variable cost of service evidence I presented on behalf of the City of San Antonio, Texas in ICC Docket No. 36180, San Antonio, Texas, Acting By and Through its City Public Service Board v. Burlington Northern Railroad Company, et al., 1 I.C.C. 2d 561 (1986) ("San Antonio"). In that case, the ICC extensively analyzed the variable costs for a unit train movement of coal on the Burlington Northern Railroad Company from the Powder River Basin, Wyoming to San Antonio, Texas. Also I presented the variable cost of service evidence in ICC Docket No. 38783, Omaha Public Power District v. Burlington Northern Railroad Company 3 I.C.C. 2d 123 (1986) ("OPPD"), in which the ICC developed the variable costs for the unit train movement of coal from the Powder River Basin, Wyoming to Arbor, Nebraska on the Burlington Northern Railroad Company. In San Antonio, the ICC found that the variable cost of service as of the first quarter of 1984 was \$12.62 per ton, just 46 cents higher than my cost calculation of \$12.16 per ton and substantially lower than Burlington Northern Railroad Company's calculation of \$17.54 per ton. In OPPD, the ICC determined variable cost for the first quarter of 1985 was \$5.31 per ton, just 11 cents higher than my calculation of \$5.20 per ton, and substantially lower than Burlington Northern Railroad Company's calculations of \$6.53 per ton.

^{7/} Rail cost finding has been the cornerstone of this firm. Dr. Ford K. Edwards the senior partner of the firm Edwards & Peabody*, was the major architect in the development of Rail Form A. Mr. Peabody carried on this tradition of innovative cost finding until his retirement in 1983. Mr. Peabody's work included participation in the Tennessee Valley Authority's ("TVA") computerization of Rail Form A. Mr. Peabody was a member of a committee of transportation consultants which was organized to assess the TVA procedure in order to make available more complete and simplified input data for the Rail Form A computer program.

* Subsequent to the retirement of Dr. Edwards in 1965, the firm name was changed to L. E. Peabody & Associates, Inc.

STATEMENT OF QUALIFICATIONS

or indirectly, since the first interim report of the contractors was released. Throughout this process, I have consistently asked for and reviewed the support and workpapers underlying the different developmental stages of the formula. I received and presented comments in February 1982 on the ICC's Preliminary 1979 Rail Cost Study. In December 1982, the ICC released the Uniform Rail Costing System, 1980 Railroad Cost Study which I reviewed along with the workpapers supporting that study and the entire developmental stage of URCS which was the basis for my Ex Parte No. 431 comments.

I have frequently presented both oral and written testimony before the Interstate Commerce Commission, Surface Transportation Board, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations, including interest. I have also presented testimony in a number of court and arbitration proceedings concerning the level of rates and rate adjustment procedures in specific contracts.

I have participated in every major ICC rulemaking proceeding since the mid-seventies, including each phase of Ex Parte 290 (Sub-No. 2), (Sub-No. 4), (Sub-No. 5) and (Sub-No. 7). On a number of occasions my predecessor, L. E. Peabody, Jr., and I have submitted evidence

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to the Commission concerning the determination of the Rail Cost Adjustment Factor ("RCAF") and the need for a productivity adjustment to properly reflect the change in railroad costs.^{1/}

Since the implementation of the Staggers Rail Act of 1980, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of coal shippers. Specifically, I have advised utilities concerning coal transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges. In particular,

^{1/} L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, July 17, 1980; L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No.-2), Railroad Cost Recovery Procedures, August 20, 1980; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, January 9, 1981; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2), Railroad Cost Recovery Procedures, July 9, 1982; L. E. Peabody, Jr.'s Verified Statement, Ex Parte No. 290 (Sub-No.4), Railroad Cost Recovery Procedures - Productivity Adjustment, October 25, 1982; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures - Productivity Adjustment, February 11, 1985; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures - Productivity Adjustment, March 28, 1985; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2) Railroad Cost Recovery Procedures, March 12, 1986; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 2) Railroad Cost Recovery Procedures, March 12, 1987; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures - Productivity Adjustment, December 16, 1988; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4), Railroad Cost Recovery Procedures - Productivity Adjustment, January 17, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 7), Productivity Adjustment Implementation, May 26, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 4) and Ex Parte No. 290 (Sub-No. 7), Railroad Cost Recovery Procedures - Productivity Adjustment, June 1, 1989; Thomas D. Crowley's Verified Statement, Ex parte No. 290 (Sub-No. 5) (89-3), Quarterly Rail Cost Adjustment Factor, June 13, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 7), Productivity Adjustment - Implementation, June 26, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No.4), Railroad Cost Recovery Procedures - Productivity Adjustment, August 14, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No.4), Railroad Cost Recovery Procedures - Productivity Adjustment, August 29, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 5) Quarterly Rail Cost Adjustment Factor, September 18, 1989; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 7), Productivity Adjustment Implementation, April 5, 1991; Thomas D. Crowley's Verified Statement, Ex Parte 290 (Sub-No. 2) Railroad Cost Recovery Procedures, November 9, 1992; Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub No. 2), Railroad Cost Recovery Procedures, November 30, 1992; and Thomas D. Crowley's Verified Statement, Ex Parte No. 290 (Sub-No. 7) Productivity Adjustment - Implementation, January 7, 1994.

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I have advised utilities on the theory and application of different types of rate adjustment mechanisms for inclusion in coal transportation contracts.

I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have been, or am currently, involved in the negotiation of transportation or coal supply contracts for over forty (40) utilities which burn coal or lignite produced in the west. These utilities purchase coal or lignite produced in Colorado, Illinois, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah and Wyoming. Generating stations operated by these utilities are located in the following nineteen (19) states: Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Texas, Wisconsin, and Wyoming.

As a result of assisting coal users in the eastern and western portions of the United States, I have become familiar with operations and practices of the rail carriers that move coal over the major coal routes in the United States as well as their cost and pricing practices.

I have developed different economic analyses for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters

STATEMENT OF QUALIFICATIONS

Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various economic problems.

I have participated in various proceedings involved with the division of through rates. For example, I participated in ICC Docket No. 35585, Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al. which was a complaint filed by the northern and midwestern rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and midwestern rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, Notice of Intent to File Division Complaint by the Long Island Rail Road Company.

Appendix B

WESTERN COAL TRAFFIC LEAGUE MEMBERS

Arizona Electric Power Cooperative, Inc.

Central Louisiana Electric Company, Inc.

Central and South West Services, Inc.

City Public Service Board of San Antonio

Colorado Springs Utilities

Fayette Power Project, Austin, Texas

Houston Industries, Inc.

Kansas City Power & Light Company

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Unitrain, Inc.

Western Resources, Inc.

Wisconsin Public Service Corporation

Financial Health Of Major Class I Railroads

<u>Carrier/Measure</u> (1)	<u>1980 1/</u> (2)	<u>Current</u> (3)	<u>Percent Change</u> (4)
1. BNSF			
a. Return On Investment	5.8%	8.8%	52%
b. NROI (Millions)	\$173	\$1,100	536%
c. Return On Equity	8.75%	10.8%	23%
d. Debt as a Percentage Of Capital	36%	13%	-64%
2. UP			
a. Return On Investment	9.6%	8.2%	-15%
b. NROI (Millions)	\$214	\$1,000	367%
c. Return On Equity	10.3%	17.1%	66%
d. Debt as a Percentage Of Capital	26%	21%	-19%
3. NS			
a. Return On Investment	9.9%	12.5%	26%
b. NROI (Millions)	\$122	\$800	556%
c. Return On Equity	13.1%	13.5%	3%
d. Debt as a Percentage Of Capital	32%	10%	-69%
4. CSX			
a. Return On Investment	9.3%	8.9%	-4%
b. NROI (Millions)	\$71	\$600	745%
c. Return On Equity	9.3%	12.0%	29%
d. Debt as a Percentage Of Capital	19%	17%	-11%

1/ Values Represent BN (Line 1), UP (Line 2), Southern (Line 3) and C&O (Line 4)

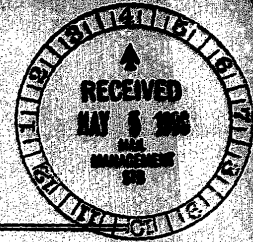
**DIFFERENTIAL IN WESTERN COAL RAIL
RATES WITH AND WITHOUT COMPETITION**
(Mills Per Revenue Ton-Mile)

<u>Category</u> (1)	<u>Moves Less Than 600 Miles</u> (2)	<u>Moves Greater Than 600 Miles</u> (3)
1. Competitive Moves	10.5	8.9
2. Captive Moves	28.8	13.2

Source: FERC Form 423 data and other publically available documents

ATTACHMENT D

BEFORE THE
SURFACE TRANSPORTATION BOARD



WESTERN COAL TRAFFIC LEAGUE,

Complainant

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant

Finance Docket No. 33726

OPENING STATEMENT OF
FACT AND ARGUMENT
OF COMPLAINANT
WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE
Daniel G. Kuehn, President
Mark D. Werner, Vice President
Mark W. Schwirtz, Treasurer

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036

Date Due: May 5, 1999

By: William L. Slover
Donald G. Avery
Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036
(202) 347-7170

Attorneys for the
Western Coal Traffic League

TESTIMONY
OF
DANIEL G. KUEHN

Q. Please state your name, business position, and address.

A. My name is Daniel G. Kuehn. I am Manager of Fuel and Energy Risk Management for the Lower Colorado River Authority. My address is 3701 Lake Austin Boulevard, Austin, Texas 78767.

Q. For whom do you appear in this proceeding?

A. I appear for the Western Coal Traffic League. I am WCTL's President. My appearance in this case has been authorized by WCTL's officers. I have appeared before the STB on behalf of WCTL in several recent proceedings.

Q. What is the WCTL and who are its members?

A. WCTL is a voluntary association of organizations, each of which consumes substantial quantities of coal from origin coal mines in the west. The WCTL was established in 1976. Today, our members collectively ship and receive more than 100 million tons of coal annually and nearly all of their coal transportation requirements are satisfied by railroads. Our members are some of UP's largest customers. Our current membership is listed in my Exhibit___(DGR-1). I have

asterisked those members of WCTL who make extensive use of UP's coal transportation services.

Q. Has WCTL participated in any other regulatory proceedings involving railroad financial issues?

A. Yes, WCTL has been involved in many such cases. One of the earliest cases in which WCTL participated was the first Revenue Adequacy case (Ex Parte No. 338) in 1977.

Thereafter, WCTL was repeatedly active before the Interstate Commerce Commission ("ICC") in numerous proceedings involving railroad cost and accounting issues including the RCAF cases and the URCS cases. In each of these major proceedings, WCTL advanced positions which the ICC adopted. One of WCTL's most important missions is to appear before this Board on all issues which impact the cost and adequacy of railroad transportation services to its membership.

Q. What were the circumstances which led up to the decision of WCTL to file its complaint?

A. It is no secret that WCTL was amongst the staunchest opponents of the UP/SP merger. Our members were skeptical of UP's claims of huge operating efficiencies; concerned about potential coal-line congestion; and fearful of the western rail duopoly. Our members who rely on UP have

experienced huge increases in their 1997 and 1998 operating costs as a direct consequence of UP's failure to deliver large volumes of coal. In this atmosphere, WCTL found absolutely unacceptable the prospect that UP might succeed in passing the costs of its service calamity on to its customers.

Q. How could UP accomplish this?

A. Very simply! Many rail rates are cost-based, cost-adjusted, or influenced in some way by carrier cost levels. If the huge costs of UP's 1997 service collapse are added to UP's regular operating costs, the costs of the collapse will then be passed on to the very customers who were directly harmed by the severe collapse.

Q. How specifically could UP accomplish this?

A. I will leave the details on this subject to our witnesses who are expert in accounting and railroad cost-finding. Suffice it to say here that if UP is permitted to record the costs of its service collapse along with its usual and customary operating costs in its R-1 Report, the railroad General Purpose Costing Systems (URCS and Rail Form A), which depend in large part on data inputs from the R-1, will include the collapse costs in UP's unit costs. All pricing

influenced by variable costs, such as the jurisdictional threshold (180 percent of variable costs), for example, will then bear a portion of the merger and collapse costs.

Q. How do your members come into contact with cost-related pricing?

A. The most direct contact is in connection with STB-prescribed rates. Two (2) of our members were recently seeking STB-prescribed UP rates. One member uses prescribed rates on another railroad and a third is currently engaged in a rate-prescription action before the STB. As contracts expire, other captive members will be considering the option of STB-prescribed rates.

Q. Do GPCS costs influence the prices your members pay in other ways?

A. Yes, they do. While most member traffic moves via contract carriage, accurate service cost data plays a crucial role in some of the contract negotiations. As noted in the recent GAO Study (Railroad Regulation, Current Issues Associated With The Rate Relief Process, GAO/RCED-99-46), contracts are often successfully negotiated, after rate cases are filed (p. 43). Other contracts employ rate adjustment mechanisms which rely upon R-1 data, URCS, etc. Railroad cost data

permeate the processes of contract negotiation and administration.

Q. Does that complete your opening testimony?

A. Yes.

Verification

STATE OF TEXAS)
) ss:
COUNTY OF TRAVIS)

DANIEL G. KUEHN, being duly sworn, deposes and says
that he has read the foregoing testimony, knows the contents
thereof, and that the same are true as stated.

s/Daniel G. Kuehn
Daniel G. Kuehn

Subscribed and sworn to before me
this 5th day of May, 1999.

Notary Public in and for Travis County, Texas.

My Commission expires _____

Exhibit ____ (DGK-1)

**WESTERN COAL TRAFFIC LEAGUE
MEMBERSHIP ROSTER
1999**

- *Arizona Electric Power Cooperative, Inc.
- *Central and South West Services, Inc.
- *City Public Service Board of San Antonio
- *Cleco Corporation
- *Colorado Springs Utilities
- *Fayette Power Project, Austin, Texas
- *Reliant Energy, Inc.
- Kansas City Power & Light Company
- MidAmerican Energy Company
- Minnesota Power
- *Nebraska Public Power District
- Omaha Public Power District
- Western Resources, Inc.
- Wisconsin Public Service Corporation

ATTACHMENT E

Attachment E

COAL SHIPPERS' PROPOSED CHANGES
TO THE BOARD'S MERGER REGULATIONS
(49 C.F.R. § 1180)

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) General. The Surface Transportation Board encourages private industry initiative that leads to the rationalization of the nation's rail facilities and reduction of its excess capacity. One means of accomplishing these ends is rail consolidation. However, the Board does not favor consolidations unless such consolidations affirmatively enhance, rather than just simply preserve, pre-consolidation competition. The Board also does not favor consolidations through the exercise of managerial and financial control if the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand. Furthermore, the Board does not favor consolidations that substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anticompetitive fashion where shippers are not made financially whole for post-consolidation service problems. Our analysis of the competitive impacts of a consolidation is especially critical in light of the Congressionally mandated commitment to give railroads greater freedom to price without regulatory interference.

* * *

(c)(2) Potential harm. There are two four potential results from consolidations which would ill serve the public -- reduction of competition, failure to enhance competition, failure to make shippers financially whole for post-consolidation service failures, failure to protect shippers from carrier pass-through of increased merger-related costs, and harm to essential services. In analyzing these

impacts, we must consider, but are not limited by, the policies embodied in antitrust laws.

~~(i) Reduction of competition. If two carriers serving the same market consolidate, the result would be the elimination of the competition between the two. Even if the consolidating carriers do not serve the same market, there may be a lessening of potential competition in other markets. While the reduction in the number of competitors serving a market is not in itself harmful, a lessening of competition resulting from the elimination of a competitor may be contrary to the public interest. The Board recognizes that rail carriers face not only intramodal competition, but also intermodal competition from motor and water carriers. The Board's competitive analysis depends on the relevant market(s). In some markets the Board's focus will be on the preservation of effective intermodal competition, while in other markets (such as long-haul movements of bulk commodities) effective intramodal competition may also be important.~~

(i) Enhancement of competition. The rail industry is highly concentrated. Any consolidation must enhance competition.

(ii) Service protection. Rail consolidations have led to significant post-consolidation service failures. Shippers must have a means to obtain prompt financial redress for such service failures.

(iii) Increased costs. Rail consolidations often produce increased costs in the form of acquisition premiums and service failure expenses. Shippers should not be required to pay these costs.

~~(ii)(iv)~~ (iv) Harm to essential service. Consolidations often result in shifts of market patterns. Sometimes the carrier losing its share of the market may not be able to withstand the loss of traffic. In assessing the probable impacts, the Board's concern is the preservation

of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

(d) *Conditions.* (1) The Board has broad authority to impose conditions on consolidations, including those that might be useful in ameliorating potential anticompetitive effects of a consolidation. However, the Board recognizes that conditions may ~~lessen the benefits of a consolidation to both the carrier and the public.~~ Therefore, the Board will not normally impose conditions on a consolidation to protect a carrier unless essential services are affected and and will in any consolidation impose the conditions set forth at 49 C.F.R. §§ 1180.10, 1180.11, 1180.12, 1180.13 and 1180.14. The Board also will impose other conditions where the condition: (i) Is shown to be related to the impact of the consolidation; (ii) is designed to enable shippers to receive adequate or competitive service; (iii) would not pose unreasonable operating or other problems for the consolidated carrier; and (iv) would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits. Moreover, the Board believes that indemnification is ordinarily not an appropriate remedy in consolidation proceedings. Indemnification conditions can be anticompetitive by requiring the consolidated carrier to subsidize carriers who are no longer able to compete efficiently in the marketplace.

* * *

(g) *Cumulative impacts and crossover effects.* The Board recognizes that events can occur during its consideration of a consolidation that can have an effect on various of the concerned parties. However, the Board is ~~mindful of the need to meet its statutory deadlines and make timely administratively final decisions.~~ Therefore, the Board will not reopen pending proceedings in order to ~~assess~~ consider the impact of potential or hypothetical combinations or transactions. ~~The proper forum for considering cumulative impacts and crossover effects is in a later proceeding. In this manner, consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to~~

~~occur. Furthermore, the Board will have the benefit of its findings from the prior proceeding to identify more precisely the impacts of the transaction. Proceedings will remain manageable in scope and size, statutory time limits will be met, and all parties will be assured of timely, administratively final decisions.~~

* * *

§ 1180.10 Service condition. [new]

The Board will impose as a condition on any major rail consolidation transaction a requirement that the consolidated carrier(s) make any shipper financially whole for any injuries the shipper incurs as a result of post-consolidation service problems. The shipper may submit a claim to a carrier for compensation under this regulation at any time following the Board's approval of the consolidation. The consolidated carrier shall pay the claim within fourteen (14) days of its receipt of the shipper's claim, provided, however, if the carrier disputes the claim, it shall so notify the claimant in writing and explain therein, with specificity, the basis for its dispute, within fourteen (14) days of its receipt of the shipper's claim. If the consolidated carrier so disputes a shipper's claim, the shipper may institute a proceeding at the Board to obtain payment. The Board shall complete any proceeding under this rule within one hundred eighty (180) days after the filing of the request for relief. A consolidated carrier may not raise as a defense that its liability to any shipper is limited by the terms of any contract or other arrangement with the shipper. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

§ 1180.11 Access Condition. [new]

The Board shall impose as a condition on any major rail consolidation transaction the following access relief:

(a) Following the Board's approval of a major rail consolidation transaction, any person, including an affected shipper, may request the consolidated carrier(s) to allow a second carrier to use its or their facilities to provide competitive rail service.

The carrier shall have ninety (90) days to respond to the request. If the carrier denies the request, the person may seek relief from the Board as provided in subsection (b) below.

(b) Upon request of any person, including an affected shipper, and subject to the requirements of 49 CFR 1180.12(a), the Board shall require railroad facilities owned by the involved rail carrier to be used by another rail carrier if the Board finds that use will not substantially impair the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business. The Board shall establish compensation for the use of the facilities on a usage basis based upon a sharing of the total costs incurred. Total costs shall include roadway maintenance expenses, dispatching expenses, and return on and of net book investment on road property. The rail carriers are responsible for establishing the conditions for use of the facilities, except compensation. However, if the rail carriers cannot agree, the Board shall establish conditions for use of the facilities. The compensation shall be adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.

(c) A rail carrier whose railroad facilities are required to be used by another rail carrier under this section is entitled to recover damages from the other rail carrier for injuries sustained as the result of compliance with the requirement or for compensation for the use, or both as appropriate, in a civil action, if it is not satisfied with the conditions for use of the facilities or if the amount of the compensation is not paid promptly.

(d) The Board shall complete any proceeding under 49 CFR 1180.12(b) within 180 days after the filing of the request for relief.

§1180.12 Bottleneck rate condition. [new]

The Board shall impose as a condition on any major rail consolidation transaction the following bottleneck rate relief:

(a) Following the Board's approval of a major rail consolidation transaction, the consolidated

carrier(s), upon the request of a shipper, the consolidated rail carrier(s) shall establish a rate for transportation and provide service requested by the shipper between any two points on the system of that carrier where traffic originates, terminates, or may reasonably be interchanged. A carrier shall establish a rate and provide service upon such request without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with any rail carrier for part or all of its transportation needs over the route of movement; provided, however, that if such a contract exists, the rate established by the carrier shall not apply to transportation covered by the contract.

(b) A shipper may challenge the reasonableness of any rate established by a consolidated rail carrier in accordance with 49 CFR 1180.13(a). The Board shall determine the reasonableness of the rate so challenged without regard to: (i) whether the rate established is for only part of a movement between an origin and a destination; (ii) whether the shipper has made arrangements for transportation for any other part of that movement; or (iii) whether the shipper currently has a contract with a rail carrier for any part of the rail traffic at issue, provided that the rate prescribed by the Board shall not apply to transportation covered by such a contract.

§ 1180.13 Paper Barrier condition. [new]

The Board shall impose as a condition on any major rail consolidation transaction the following paper barrier relief:

(a) "Paper barriers," as used in this section, refer to the terms in agreements between (i) Class I railroads and (ii) Class II or Class III railroads ("shortlines") or non-carriers which impair or penalize the shortline's freedom to interchange traffic with carriers with which the shortline can physically connect.

(b) Following the Board's approval of a major rail consolidation transaction, any person (including an affected shipper) may request the consolidated carrier to remove one or more paper barriers. The carrier shall respond within thirty (30) days after receipt of the request. If the carrier does not grant the request, a person may institute proceedings at the Board.

(c) Upon receipt of a request, and subject to the provisions of 49 CFR 1180.14(b), the Board shall direct the consolidated carrier to remove a paper barrier unless the carrier can demonstrate that retention of the paper barrier is in the public interest. In making a public interest finding, the Board will be guided by the principles set forth in 49 CFR 1180.14(d).

(d) Paper barriers to interchange are inherently anti-competitive, and are unreasonable unless they are necessary to the achievement of a public benefit that outweighs the harm they cause to competition, and then only if they are no broader or more restrictive than necessary to achieve that benefit. There is a rebuttable presumption that a paper barrier is unreasonable insofar as it (i) lasts longer than five (5) years from the date of the agreement containing the paper barrier, or (ii) includes any financial penalty on a shortline that is triggered by the interchange of traffic with another carrier, or (iii) includes credits for traffic interchanged with a carrier against a rental or sale price that reflects a return of more than the railroad industry's cost of capital on the fair market value of the properties sold or leased. For purposes of this section, "fair market value" shall be computed without considering the revenues earned by the carrier for handling traffic originating or terminating on those properties over other parts of its system.

§ 1180.14 Regulatory cost condition. [new]

The Board shall impose as a condition on any major rail consolidation transaction the following regulatory cost relief:

(a) In any proceeding at the Board involving development or use of a consolidated carrier's costs for providing rail transportation service, costs associated with rail service problems, or purchase premiums paid for carrier assets, such items shall be excluded from the carrier's cost of service under the Board's General Purpose Costing Systems. "Purchase premium," as used in this paragraph, refers to the difference between the net book value and the purchase price of the involved rail properties. This section shall apply to all major consolidation transactions approved on or after January 1, 1996.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2000, I have served a copy of the foregoing Joint Comments of Subscribing Coal Shippers on all persons designated as a Party of Record in this proceeding by postage pre-paid, first-class United States mail.

John H. LeSeur

John H. LeSeur
An Attorney for Subscribing
Coal Shippers