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July 13, 2006

VIA E-FILING

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423-0001

Re: STB Ex Parte No. 575 – Review of Rail Access and Competition Issues –
Renewed Petition of the Western Coal Traffic League

Dear Mr. Williams:

In accordance with the Board's Decision issued June 2, 2006, in the above-referenced proceeding, enclosed for filing in the above-referenced proceeding is the "Written Statement of Michael F. McBride on Behalf of Edison Electric Institute."

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

Enclosure

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 575

REVIEW OF RAIL ACCESS AND COMPETITION ISSUES –
RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE

**WRITTEN STATEMENT OF MICHAEL F. McBRIDE ON BEHALF OF
EDISON ELECTRIC INSTITUTE**

Pursuant to the Board's Decision issued June 2, 2006 in the above-referenced proceeding, Edison Electric Institute ("EEI") hereby files its written statement of position. EEI applauds the STB for conducting this proceeding. EEI is the national association of shareholder-owned electric utilities. As the Board knows, our members rely upon railroads to transport approximately 70 percent of the coal they use to produce electricity. Many of our members are captive to a single railroad. All of our members are strongly supportive of measures to increase competition among rail carriers.

Through their comments filed herein, EEI member companies Ameren, Kansas City Power & Light Company ("KCP&L"), a member of the Western Coal Traffic League ("WCTL"), and Entergy, have brought to the STB's attention the real problems that they have with "paper barriers" at certain of their coal-fired power plants. Accordingly, EEI concluded that it would be appropriate for it to make this filing, and to participate in this proceeding, to add its voice to those of its members in opposing "paper barriers."

EEI has reviewed the submissions of Ameren, WCTL and Entergy in this proceeding, and endorses them and adopts them as EEI's own position. EEI makes this submission to emphasize the importance of the paper barrier issues for all of our members.

The STB should not permit or approve future "paper barriers" of the sort that adversely affect competition, such as those experienced by Ameren, KCP&L, and Entergy. Such "paper barriers" exist to limit competition, and are thus unwise both as restraints of trade and also as potentially disruptive in this era of constrained capacity on the railroads.

The STB is mindful of the capacity constraints that now exist on railroads, as Chairman Buttrey's recent letter to railroad Chief Executive Officers indicated, and the STB should do all that it can to prevent such constraints. Where the railroad systems have physical-interconnection capacity now, it is, frankly, bad public policy to allow contractual restrictions to prevent such interconnections from facilitating improved rail service, as well as any competition that may also occur as a result.

Indeed, there is a larger question about railroad contractual restrictions that is of concern to EEL. Various agreements between railroads have the effect of not permitting one railroad to serve shippers on a line to which the railroad has operating rights. Often, such rights are referred to as "overhead rights." A good example of such a contractual limitation was in dispute in *State of Minnesota by BN Railroad Co. v. Big Stone Dev. Corp.*, 990 F. Supp. 731 (D. Minn.), *aff'd*, 131 F.3d 144 (8th Cir. 1997). There, a short-line railroad to which Otter Tail Power Company wanted to "build out" was not permitted to serve Otter Tail's Big Stone Plant because of the court's interpretation of the line-sale agreement. Had the short-line been allowed to offer Otter Tail service, Otter Tail would have had competitive rail options and may not have had to file its rate complaint against BNSF Railway in STB Docket No. 42071. Such arrangements stifle competition and may cause the inefficient use of the existing rail

system. The Board should adopt policies to prevent such contractual restrictions from occurring in the future.

If such contractual restrictions are not prohibited, it is not possible for a free market to exist generally for railroad transportation services. Such an outcome makes vital this Board's role as regulator, to provide a substitute for a competitive market.

EEI realizes that there is a more difficult issue that arises with "paper barriers" that were agreed to in the past and which are now in effect. The selling railroad (typically, a Class I) argues that it would not have sold the line of railroad at the price it did but for the "paper barrier." However, most or all were approved or permitted to come into existence during an era of excess capacity. There is now a strong public policy argument for requiring such "paper barriers" to "sunset," *i.e.*, to become ineffective, perhaps after a reasonable notice period. Such a notice period would allow the parties to the "paper barrier" transaction to negotiate the terms of future interconnections.

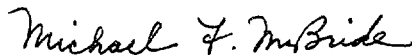
There are legal issues that cast doubt on the continuing validity of existing "paper barriers." For example, such arrangements may be viewed as unlawful "pooling" agreements unless they were approved by the STB under 49 U.S.C. § 11322. *E.g.*, *Chicago & N.W. Ry. Co. v. Peoria & P.U. Ry. Co.*, 319 F.2d 117 (7th Cir. 1963), *cert. denied*, 375 U.S. 969 (1964). Accordingly, EEI believes that the STB has the authority, immediately, to declare that any "paper barrier" not approved by it is unlawful, and that any "paper barrier" previously approved by it will be declared unlawful after a period of time, unless the parties to the agreement can convince the STB that the arrangement is not unlawful as one that allocates traffic between or among railroads or otherwise acts as an unlawful restraint of trade.

Now that the Class I railroads are doing so well financially this proceeding is a great opportunity for the STB to demonstrate to the shipping community (*i.e.*, industrial America), the public, and their elected representatives, that the STB is determined to play its part in beginning to "level the playing field," by rejecting unnecessary barriers to competition among railroads. "Paper barriers" were approved or tolerated at a time when it was perceived that the Class I railroads were not doing as well financially as they are today. The improved financial circumstances of the Class I railroads are ample reason to be unwilling to see "paper barriers" continue to prevent competition and artificially limit the availability of useful capacity in the U.S. rail system.

Conclusion

The Board should disallow future "paper barriers" entered into or approved after the effective date of its decision in this proceeding, and it should adopt a policy that past "paper barriers" are unlawful if they either limit the availability of rail capacity or have the effect of dividing markets or restraining competition among railroads. Even in the absence of such findings, the Board should declare that no "paper barrier" now in existence will continue to have legal effect after the expiration of a short notice period.

Respectfully submitted,



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