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July 13, 2006

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Pursuant to the June 2, 2006, decision in this proceeding, Ameren Energy Fuels and Services Company ("Ameren") hereby files a summary of its testimony to be provided at the July 27, 2006 hearing. If you have any questions regarding this filing, please contact me at the telephone number or email listed above.

Sincerely,


Sandra L. Brown

cc: James Sobule
Robert Neff

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 575

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

TESTIMONY OF AMEREN ENERGY FUELS AND SERVICES COMPANY

Good morning, Chairman Buttrey and Commissioner Mulvey. My name is Sandy Brown, and I am an attorney representing Ameren Energy Fuels And Services Company, a subsidiary of Ameren Corporation which I will refer to as “Ameren.” On behalf of Ameren, I would like to thank the Board for taking comments and holding a hearing on the paper barrier issue.

In response to the Board’s February 1, 2006 decision, Ameren filed comments in this docket on March 8, 2006. Ameren also filed a letter on April 13 in this docket re-emphasizing Ameren’s belief that a formal rulemaking should be instituted on the paper barrier issue. Ameren is testifying today in response to the Board’s June 2 decision to conduct a public hearing on paper barriers. Ameren’s oral testimony will focus on three points: First, I will provide some background on Ameren and describe a paper barrier impacting Ameren’s Labadie Plant. Second, I will address the Board’s clear authority to regulate paper barriers. Third, I will provide suggestions to address the anticompetitive nature of paper barriers.

A. BACKGROUND OF AMEREN AND THE PAPER BARRIER AT AMEREN'S LABADIE PLANT

Ameren purchases approximately 40 million tons of coal annually for its 11 coal-fired plants. Ameren's Labadie Plant is located in Franklin County, Missouri and approximately 10 million tons of coal is purchased annually for the Labadie Plant. Ameren's Labadie plant is located at an intersection of what was commonly known as the Rock Island and Missouri Pacific lines. The Rock Island line that has a connection to the Labadie Plant property is the vehicle that was used to create the paper barrier that I will discuss in a minute.

When the Labadie Plant was built in the 1970's, coal moved over the Rock Island line from Kansas City to the Plant. Until 1996, the Labadie Plant enjoyed multiple service options and had received coal from both the Union Pacific Railroad ("UP") and the Southern Pacific Railway ("SP"), or their predecessor railroads. In 1996, the former SP/Rock Island line was acquired by UP as part of the UP/SP merger. As the Board is aware, Ameren had to petition the Board for clarification of the UP/SP merger conditions in order to have Ameren declared a "2-to-1" shipper and entitled to certain merger protections afforded similarly situated shippers. In June 2000, the Board declared Ameren a "2-to-1" shipper and granted Labadie access to the BNSF via the merger condition known as the "omnibus clause," which attempts to replicate SP's service to Labadie by granting BNSF trackage rights over the UP. Notwithstanding these rights, BNSF has not moved any significant amount of coal to Labadie because BNSF's rates have not provided a competitive alternative.

Before the UP/SP merger was approved and before Ameren's "2-to-1" status was clarified, UP began the process to sell off the former Rock Island line because UP owned the parallel line between St. Louis and Kansas City. Ultimately, a portion of the former Rock Island line, from Vigus to Pleasant Hill, Missouri, a total of 244.5 miles, was sold by UP to GRC

Holdings, which then formed the Missouri Central Railroad to own and operate the line. UP retained ownership of parts on either end of the line – approximately 24.8 miles on the Kansas City side and approximately 8.7 miles on the St. Louis side. As part of the line sale documents, several restrictions were imposed upon the Missouri Central's ability to provide coal transportation service to the Labadie Plant, even though the Missouri Central track connects to the Labadie Plant track.

As the Board is aware, Ameren now owns the Missouri Central because Ameren stepped in as the last option financier to save the troubled Rock Island line. This line runs through the center of AmerenUE's electric service territory and the line has a physical connection to the Labadie Plant. Thus, Ameren felt it imperative to not let the line be abandoned and lost forever. The line had been headed for abandonment for some time and there was an abandonment application actually pending at the Board for part of the line, when Ameren financed the purchase of the line. If the line had been abandoned, UP would have presumably received scrap value for the track structure and limited payment for whatever property interest UP owned in fee simple. As part of selling the line, UP was released of its obligation to provide service or maintain the line. At the time of the sale, UP had attempted to become the sole railroad able to provide service to Labadie, so the purpose of the paper barrier on the Missouri Central was to protect monopoly access at Labadie. The Board should limit or eliminate this type of action and instead encourage competition in line sales as directed in the Board's governing statutes.

As the ultimate purchaser, Ameren has seen the language of the actual restrictions impacting Ameren's Labadie Plant. Other shippers might not even know the terms and the extent of a paper barrier restriction impacting their facility. While Ameren is aware that the Board issued a decision on July 10 imposing a protective order in this proceeding, Ameren

encourages the Board to more formally order the production of all documents creating the paper barriers, as part of a rulemaking if necessary, so as to provide a complete record for the Board.

B. THE BOARD'S AUTHORITY OVER PAPER BARRIERS

The Board has – and should – exercise authority over anticompetitive behavior engaged in by railroads, particularly over the formation of unreasonable paper barriers. This authority is based upon and supported by (1) the Board's inherent statutory power, (2) the Board's authority to ensure that railroads fulfill their common carrier obligation, (3) regulatory powers afforded federal agencies by Congress in analogous situations, and (4) as addressed in recent Board decisions.

1. STB Statutory Authority Over Rail Competition – Including Paper Barriers

The Board has exclusive jurisdiction over rail transportation under 49 U.S.C. § 10501. Paper barriers are usually established in transactions that are “approved” pursuant to Board's exemption authority under 49 U.S.C. § 10502. The Board has continuing jurisdiction under this statute to revoke an exemption, “to the extent ... necessary to carry out the rail transportation policy (“RTP”).” The use of the exemption process to implement transactions with paper barriers, gives the Board authority to review, at any time, the past, present and future transactions with an eye to carrying out the RTP and eliminating unreasonable paper barriers.

The primary reason that certain paper barriers are unreasonable and conflict with the RTP is that they are specifically designed to prohibit or stifle competition. It is undisputed that our national public policy strongly favors competition, in the railroad industry as elsewhere. This is captured in the heavy emphasis placed on competition in the RTP enacted by Congress in 49 U.S.C. § 10101. Indeed, one third of the points that Congress has mandated and codified in the RTP of 49 U.S.C. § 10101 specifically charge the STB to protect and promote rail competition.

The Board has recognized its authority to promote competition in rail construction cases and the revised rules for rail mergers and this concept should be applied in line sales or other transactions that are currently used to create paper barriers. As the Board is probably aware, Ameren has been active in trying to improve rail service and rates at its plants by creating competitive transportation alternatives by methods such as rail construction. The Board encouraged shippers to invest in rail construction to promote competition. Ameren has shown that it is willing to do its part in investing in and expanding competition at its Plants. Thus, Ameren is merely asking for a level playing field so that the promotion of competition is applied in all transactions before the Board.

2. *A Railroad's Common Carrier Obligation Is Hindered By Paper Barriers*

The Board should also look at whether paper barrier restrictions interfere with and, therefore, violate the common carrier obligation of railroads. If a rail line transaction includes a provision that prohibits the purchasing railroad from providing service to a shipper or shippers along its line, then the paper barrier should be deemed an unreasonable contract restriction to the acquiring railroad's common carrier obligation under Section 11101(b). As in other instances, the Board should not approve agreements that require a railroad to contract away its common carrier obligations.

3. *Agencies Commonly Regulate Anticompetitive Industry Agreements*

The Board's mandate to promote competition under the rail transportation policy is similar to the authority over competition problems exercised by other agencies. In general, Congress has charged agencies with promoting competition, and giving them the means to carry out that mandate. The STB should exercise its authority over competition issues within their

jurisdiction, such as line sale and lease transactions, and follow the general policy that competition is not only desirable it is imperative in the rail industry.

It is instructive to look at the approach taken under the antitrust laws for evaluating whether a competition-restricting condition, similar to a paper barrier, is a reasonable restraint on competition. Federal antitrust laws will permit, for example, covenants not to compete, so long as they are limited in geographical scope and in time. The antitrust case law approach is an effective method to ensure each transaction receives the proper scrutiny, and thereby prevent the parties' ability to privately contract around forbidden restrictions on competition.

Similarly, the rail transportation policy weighs in favor of agreement terms that do not interfere with competition. Unreasonable paper barriers, designed to deter (if not prohibit) a short line railroad from interchanging traffic with the seller's competitors or from carrying certain traffic on its line, serve neither the efficiency nor the public interest goals of the RTP and the Board's governing statutes. Indeed, enhancing competition is the common thread that runs throughout much of the legislation Congress has enacted to address market issues, as well as the transportation deregulation statutes. Efforts to suppress competition are antithetical to this body of administrative law.

In sum, comparable competition analyses performed by other agencies, regarding the potentially anticompetitive effects of agreements, would be rightfully exercised by the Board in evaluating paper barrier effects. The Board's ongoing authority, under the exemption authority in Section 10502, should rightfully be exercised to ensure that competition is fostered by evaluating the impact on competition that could result from allowing the paper barrier terms to remain in the agreement.

4. Recent Statements by the Board Regarding Paper Barriers.

Finally, the anticompetitive nature of paper barriers has been recognized by one member of the Board in recent decisions. For example, in *Buckingham Branch Railroad Company – Lease – CSX Transportation, Inc.*, Commissioner Mulvey noted that paper barriers have little or no competitive value in rail line agreements. These concerns, as well as the appropriateness of a time limitation for any restriction, were reflected in other decisions that addressed paper barriers. These statements appropriately reflect the Board's duty to promote the public interest which is governed by the RTP. Ameren concurs that the Board has a duty to evaluate paper barriers in transactions with an eye toward opening up, not shutting down, rail carrier competition to shippers.

C. SUGGESTED REMEDIES TO ADDRESS THE PAPER BARRIER ISSUE

Ameren respectfully submits that the Board can – and should – use its authority to review alleged anticompetitive effects of paper barriers. If needed, Ameren encourages the Board to initiate a rulemaking on paper barriers. Some suggested remedies to consider for addressing the anticompetitive aspects of paper barriers are as follows. First, the Board should institute a sunset provision for all current paper barriers, limiting their life to no more than 5 years. This provision supports the RTP in promoting carrier competition (49 U.S.C. § 10101(1), (4), (5), (7)), while recognizing that a reasonable restriction (limited by time and location) could assist the financial position of divesting carriers (49 U.S.C. § 10101(3)). Second, the Board should develop rules to conduct a case-by-case review of current paper barriers to determine whether they should be revoked or dissolved before the sunset period, as permitted by the Board's established power to review agreements for line sales. Finally, the Board should establish policies to ensure unreasonable paper barriers are not permitted in future rail line sales and leases.

Thank you for allowing Ameren to share its views today. I am happy to answer any questions. We look forward to the Board's timely action on this important issue.