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October 2, 2006

VIA E-FILING

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

RE: Supplemental Comments of Entergy Corporation in response to *Rail Fuel Surcharges*, Ex Parte No. 661

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the Supplemental Comments of Entergy Corporation.

Yours very truly,



Sandra L. Brown

SLB:bgh
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

REVIEW OF RAIL FUEL SURCHARGES

**SUPPLEMENTAL COMMENTS OF ENTERGY
CORPORATION**

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October 2, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

SUPPLEMENTAL COMMENTS OF ENTERGY CORPORATION

I. Introduction

On March 14, 2006, the Surface Transportation Board (“Board” or “STB”) issued a notice of public hearing on rail fuel surcharges to be held on May 11, 2006, and invited interested parties to submit comments on railroad fuel surcharges (hereinafter “Notice”). Entergy Corporation (“Entergy”) submitted written comments in response to the Notice on April 27, 2006 (hereinafter “Entergy Comments”).¹ Entergy also appeared and testified at the May 11 hearing. The STB issued a decision on August 3, 2006 in this proceeding (hereinafter “Decision”). The Decision included four proposals developed by the Board to preclude the “unreasonable practice” of assessing “fuel surcharges” that allow the recovery of more than the railroads’ incremental fuel costs. In response to the Board’s request for public comment on the proposals, Entergy hereby submits its supplemental comments.

II. Summary of Supplemental Comments

Entergy commends the Board for acting upon the contentious issue of fuel surcharges and applauds the Board’s efforts to establish policies that encourage reasonable solutions to the

¹ The Identification and Interest of Entergy can be found in Entergy’s Comments filed with the Board on April 27. Entergy’s comments filed herein are intended as a supplement to the Entergy Comments. The comments attempt to avoid restating Entergy’s position on issues except to the extent necessary to address the Board’s proposals.

manifold problems created by the railroads' unreasonable fuel surcharge practices. Entergy supports each of the following findings of the Board:

1. That the Board has jurisdiction under 49 U.S.C. §10702(2) to address the unreasonable practice “of applying what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate.” Decision at 4.
2. That it is not a reasonable practice to compute fuel surcharges as a percentage of existing rates. Rather, a lawful surcharge must be “directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied.” *Id.* at 4-5. Moreover, alternatives to tying a surcharge to an existing rate must “have a reasonable nexus to the fuel consumption of the movement involved.” *Id.* at 5.
3. That it is not a reasonable practice to adjust a rail rate using the Rail Cost Adjustment Factor (“RCAF”) and also assess a fuel surcharge. *Id.*
4. By implication, that the West Texas Intermediate Crude Oil (“WTI Index”) is not an appropriate index for the fuel surcharge formula. *Id.* at 6.

The Board has the authority to make and correctly used its authority in reaching these conclusions. To prevent further abuses, the Board must take the additional step to make clear that railroads cannot incorporate the same or similar unreasonable programs and practices into future contracts with shippers or otherwise implement or engage in practices the Board has found unreasonable.

The Board put forth four proposals aimed at enforcing its findings. Entergy supports the Board's proposals with the following recommendations:

1. With respect to the first two proposals, the requirement that a fuel surcharge be directly linked to the incremental changes in the movement-specific costs for which the surcharge is being assessed is essential. And Entergy fully endorses the elimination of fuel surcharges in cases where the same costs are recovered in a base rate escalator. Railroads should be required to separate out the fuel and non-fuel components for all future rate quotes to shippers. A rebuttable presumption as to the reference price

of fuel components should apply if the carrier does not split up and make available these costs to the shipper.

2. Entergy supports the continued use of the RCAF and the elimination of separate fuel surcharges. Entergy is not opposed to the use of the AILF Index for non-fuel base rate components and the Energy Information Administration No. 2 Diesel Retail Sales Index (“EIA Index”) for fuel components, provided certain threshold criteria are satisfied, including the time frame of the index matches the time frame of the rate charged, the cost adjustment mechanism is neutral (adjustments can be made up or down), and duplicate or over-recovery is prevented.
3. Entergy also supports all of the reporting requirements the Board proposed in its Decision and calls for their immediate implementation. Additional reporting obligations (the reporting obligation discussed in paragraph number 1 above and the reporting of certain historical data) should be imposed to provide much needed transparency in variable rates, the ability for shippers to verify costs for which they are being charged and to reduce shippers’ exposure to further unreasonable fuel charge practices.

III. Supplemental Comments

A. The Board Correctly Applied 49 U.S.C. § 10702(2)

Under 49 U.S.C. §§ 10702 and 10704(a)(1), the Board has authority over railroad practices. If a railroad practice is found to be unreasonable, the Board can order the railroad to cease engaging in it or the Board can prescribe the “practice to be followed.” 49 U.S.C. § 10704(a)(1). The Board correctly applied these principles in reviewing the railroad’s fuel surcharge practices.²

² Additional support of the Board’s authority under 49 U.S.C. § 10702 can be found in Entergy’s Comments filed with the Board on April 27. Entergy agrees with the Board’s conclusion that it has the requisite authority as shown in the Board’s August 3rd Decision.

B. The Board Should Confirm That Its August 3rd Decision Impacts Future Contract Negotiations

Entergy supports the Board's findings regarding the unreasonable fuel surcharge practices of the railroads. The Board should make explicit that its "unreasonable practices" findings and other determinations in the Decision preclude both the inclusion in future shipper contracts of a fuel surcharge incorporating, directly or indirectly, such practices and other conduct by the railroads to achieve the same effect. Without this needed protection, railroads could continue to implement in contracts and engage in the very fuel surcharge practices the Board ruled unreasonable. Fuel surcharges of the type rejected by the Board are routinely included in rail contracts. Carriers present such fuel surcharges to shippers in contract negotiations on a "take-it-or-leave-it" basis and shippers have no realistic choice but to execute the contract with the unreasonable provisions. The Board should act decisively to make clear that railroads cannot circumvent the Decision through the expedient of inflexible contract demands or other means.

C. Comments on Specific Board Findings and Proposals

The Board has put forth four proposals in the Decision designed to "preclude [the] unreasonable practice of assessing what is labeled a fuel surcharge but is not limited to recouping fuel costs not reflected in the base rate." They are: (1) the proposal that fuel surcharges must not be tied to the base rate but must be limited to the incremental changes in costs for a particular movement; (2) the proposal to prohibit the use of a fuel surcharge in cases where the same costs are recovered in a base rate escalator; (3) the proposal that railroads would be required to use one index for measuring fuel cost increases, EIA Index; and (4) the proposal that each Class I railroad must submit monthly data to the Board, such as a "railroad's actual total fuel costs, total fuel consumption and total fuel surcharge revenues, as well as how much of its total fuel

surcharge revenues were shared with its shortline connections.” Entergy’s Supplemental Comments address each proposal below.

1. Linkage of Surcharge to Actual Incremental Increase in Fuel Costs for Particular Movement

In its Decision, the Board rightly determined that it is an unreasonable practice under 49 U.S.C. § 10702(2) to compute fuel surcharges as a percentage of existing rates. Decision at 4. Rather, to the extent a fuel surcharge can be assessed, the Board found it must be “directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied.” Under this standard virtually all of the current Class I railroad tariff “fuel surcharges” violate §10702(2) by computing and assessing fuel surcharges as percentage of the base rate. Accordingly, the Board admonished the railroads to “reexamine their method of calculating fuel surcharges.” The Board proposed that a fuel surcharge that could pass muster under § 10702(2) would “be tied not to the level of the base rate but to those attributes of the movement that directly affect the amount of fuel consumed: either mileage alone, or preferably weight and mileage. Railroads would have discretion to devise an alternative methodology, so long as it would have a reasonable nexus to the fuel consumption for the movement involved.” *Id.*

Entergy supports the requirement that a fuel surcharge, or any surcharge for that matter, have a direct correlation to the incremental changes in the movement-specific costs for which the surcharge is being assessed. As noted in prior comments in this proceeding, a proper fuel surcharge adjustment mechanism must, among other things, define the movement-specific fuel cost components and the means or formula(s) for adjustment; must exclude both fuel consumption costs already captured by the base rate or a separate rate adjustment formula and costs unrelated to the consumption of fuel in a movement; must have well-defined means of

measuring changes to the relevant movement-specific cost component; must operate to reflect both increases and decreases to the fuel specific cost components and to yield accurate fuel cost adjustments; and must have results that are independently and readily verifiable.

A fundamental principle underlying the Board's "reasonable nexus" criterion is that fuel and non-fuel base rate components must be segregated. For reasons discussed in Paragraph III(C)(4) below, the Board should require each Class I railroad to report both the fuel and the non-fuel components of each rate to a shipper to facilitate an accurate measurement of fuel costs. If the Board declines to impose this reporting obligation (or despite the obligation, a railroad refuses or fails to provide the required data), the Board should adopt (or ensure the application of) a presumption rebuttable by the railroad with respect to any future rate quote made by the railroad to a shipper. The presumption is that the railroad's benchmark fuel costs for the term of a quoted movement are reflected in the base transportation rates at the time of the rate quote. A valid fuel surcharge could be applied only to the fuel costs portion of base rates, calculated using the applicable URCS cost factors, and only to the incremental changes in such costs to the extent not recouped in a separate rate adjustment formula. Incremental changes would be determined by reference to the benchmark fuel costs (or the last incremental change thereto). The establishment of such a presumption is eminently reasonable, since it must be assumed that the railroad acted in a prudent manner and quoted rates that cover its operating costs for the movement and provided a profit component, and entirely consistent with the Board's "reasonable nexus" directive.

2. "Double Dipping" Prohibition and Use of RCAF

The Board concluded in its Decision that "[i]t is possible that some carriers have been charging twice for the same fuel cost increases, by both escalating the base rate using such an

index [the RCAF] (without first subtracting out the fuel cost component) and applying a fuel surcharge. . . Engaging in such ‘double dipping’ would also be an unreasonable practice, and we propose to prohibit the use of a fuel surcharge to recover increases in fuel costs to the extent those same increased costs are also recovered through the application of an escalator to the base rate that incorporates changes in fuel costs.” Decision at 5. Entergy agrees.

Most current Class I railroad fuel surcharge practices mirror exactly what the Board intends to prohibit. The base freight rate a shipper pays is adjusted by an index which escalates the entire base rate, including all of the fuel costs already included in the base rate. To prevent this sort of “double dipping” and for other reasons set out below in Paragraph III(C)(4), the railroads should be required to separate the fuel and non-fuel components of their base rates and to provide this information to shippers in their rate quotes for both common and contract rates. A rebuttable presumption of the type described in Paragraph III(C)(1) above should be held to apply in the event the railroads come under no such reporting obligation (or are but fail to provide the necessary data).

a. The Prohibition on “Double Dipping” Can Be Best Enforced by Favoring the Use of RCAF to Recover Fuel Costs

As evidenced in previous comments, “double dipping” is occurring based on the use of the RCAF **and** the use of a fuel surcharge factored as a percentage of the rate. The RCAF was specifically designed and implemented by the Interstate Commerce Commission to recover fuel cost increases without the need for a separate fuel surcharge. *See* Entergy Comments at 9; *citing Ex Parte No. 290* (Sub No. 2), *Railroad Cost Recovery Procedures*, 45 Fed. Reg. 81217 (Dec. 10, 1980)(“the procedures proposed in this notice will permit railroads to recover fuel cost increases along with other cost increases on a quarterly basis...We thus propose that our current *Ex Parte 311* fuel surcharge mechanism be discontinued.”) *See also, id., citing Ex Parte No.*

290 (Sub-No. 2), *Railroad Cost Recovery Procedures*, 364 ICC 841, 852 (1981) (“adoption of [the RCAF] “permit[s] railroads to recover fuel cost increases along with other cost increases on a quarterly basis . . .” and “[m]aintaining a separate surcharge mechanism for fuel would, in our view, serve no useful purpose once these rules are in place, and would, in fact, only complicate the operation of the new system”).

While railroads may not be happy with the timing of their fuel cost recoupment under RCAF, no railroad in this proceeding has disputed that the changes in a railroad’s fuel costs for a particular movement would eventually be recovered under the RCAF with a fuel cost component. As the Board noted in the Decision, the primary reason advanced why an additional or separate “surcharge” is needed is the claim that the RCAF does not recover costs fast enough when the price of fuel “spikes.”³ Decision at 6.

The railroads have made no showing in this proceeding that fuel prices have spiked so dramatically in the past several years that they justify an accelerated recovery of fuel costs above the RCAF. To the extent that the railroads believe the RCAF is not allowing them to recover their fuel costs in a timely fashion, they should seek appropriate relief from the Board.⁴ *Railroad Cost Recovery Procedures*, 1 ICC 2d at 218 (In adopting the methodology for calculating the RCAF, the ICC stated that “significant problems in the accuracy of fuel data” could warrant a

³ The railroads have also asserted that a separate fuel surcharge is needed in order to more quickly and fully account for world events impacting fuel prices. It is worth noting that, in a filing made by AAR in December 2005, identical factors (the occurrence of world events, including Hurricane Katrina and Hurricane Rita) were cited in support of large increases in the fuel component of the RCAF. Ex Parte No. 290 (Sub-No. 5) (2006-1), *Quarterly Rail Cost Adjustment Factor*, AAR forecast, Appendix B (page 1) (filed Dec. 5, 2005). And in fact, due to world events and fuel spikes the most recent adjustment to RCAF raises the fuel component. *Quarterly Rail Cost Adjustment Factor*, Ex Parte No. 290 (Sub-No. 5) (2006-4) (served September 20, 2006), Appendix A, Line 2.

⁴ Entergy would support a modification to the RCAF that would account for differences in unit train costs such that there would be an RCAF mechanism for unit trains and an RCAF mechanism for carload movements.

change in the fuel component of the RCAF). Thus, the Board's prohibition on "double dipping" can be enforced by strongly disfavoring departures from the RCAF as a rate adjustment methodology.

b. Use of the All-Inclusive Index Less Fuel (AIILF)

In its Decision, the Board stated that "[r]ailroads could continue to collect a fuel surcharge if they remove the fuel cost component from the RCAF (or other index) used to escalate the base rate. That approach would have the benefit of avoiding the longer time lag for recovery that is associated with the quarterly RCAF, in favor of a fuel surcharge that is adjusted more rapidly." Decision at 6.

Entergy believes that use of the RCAF without a separate fuel surcharge is the preferred course. But if the Board believes that other indexes are permissible, Entergy is not opposed to the application of the AIILF Index to non-fuel components of the base rate, subject to the following limitations. First, the AIILF Index must be restricted solely to use with non-fuel cost components. It is inappropriate to adjust the entire rate (which includes fuel costs) via the AIILF Index, and the railroads should be barred from doing so. Second, the railroads must be ordered to split out and make available to shippers on a timely basis, under the supervision of the Board, the fuel and the non-fuel components in its base rate. As discussed in Paragraph III(C)(4) below, this requirement will act as a safeguard against the over-recovery of costs and provide other needed benefits to the rate process. Finally, if it permits use of the AIILF Index, the Board should provide direct oversight of adjustments and implementation of the AIILF, as it does with RCAF.

3. Use of the EIA Index

If a railroad is permitted to impose a separate fuel surcharge upon shippers, then requiring it to adopt the proposed EIA Index to track fuel price movements is a reasonable idea. The EIA Index is updated every month, which would allow the railroads to reflect fuel cost adjustments a little more quickly than with the RCAF. However, if the EIA Index (or any other index) is permitted in fuel surcharge calculations, it must be applied in a way that captures only the applicable net fuel price change relative to the base rate for fuel and prevents excessive recovery. For example, if the transport movement occurs in November 2006 and the applicable tariff or base fuel rate was established in January 2006, then any fuel surcharge imposed for service in November 2006 must be computed with reference to the net change in fuel price occurring since January 2006. To avoid the serious disconnect shippers currently experience, the base rate for fuel needs to be established by fuel prices prevailing at or reasonably prior to the date the base rate was established. And, as with the AILF Index, the railroads must separate out the component costs, in this case, fuel, and ensure that the affected shippers can conduct meaningful reviews of those costs and any adjustments to the fuel costs.

4. Reporting Requirements

The railroads hold the data the Board and shippers need to evaluate fully the accuracy and propriety of fuel surcharge determinations and the correlation between the computed surcharges and the railroads' actual fuel costs. That critical reality is a key reason why transparency and Board oversight are essential to a fuel surcharge program and why the parties have devoted so much time and attention to this particular issue.

Entergy supports all of the reporting requirements the Board proposed in its Decision, including the requirement that "each Class I railroad should report, on a monthly basis, its total

expenditures for fuel, the total gallons of fuel it consumed, the increase or decrease in its cost of the fuel from the previous month, its revenue tons for the month, and its revenue tons to which the fuel surcharge was applied.” Decision at 1. The Decision, however, falls short of providing all necessary reporting protections. Therefore, Entergy proposes or re-urges the Board’s acceptance of the following additional reporting requirements.

First, the Board’s recommended reporting requirements should be implemented immediately. There can be no legitimate reason to delay the reporting of information a railroad already has, especially when inextricably linked to unreasonable practices, and none has been offered.

Second, Class I railroads should be required to separate out the fuel and non-fuel components of the base rates that are quoted to shippers. Requiring fuel and non-fuel to be quoted separately is absolutely necessary in the light of the prior unreasonable practices employed by the railroads. Absent this information, a shipper cannot know whether the fuel surcharge costs are being appropriately applied or calculated for rail movements, the surcharge process will lack the transparency necessary to ensure compliance with the Decision, and the gamesmanship and suspicions that plague the fuel surcharge process today could well continue.

Finally, the Board should require each Class I railroad to provide sufficient historical data regarding its fuel surcharges and the fuel and non-fuel components of its rates to enable an accurate assessment of its relevant historical actual fuel costs. The railroads’ fuel surcharge programs have been based to date upon fuel costs set many years ago, in the 2002 time period. While the fuel surcharge programs clearly need changing, changing them without conducting any review of the historical cost data would be ill-advised. *See* Rail Business, Sept. 11, 2006 p. 5, “STB fuel surcharge plan has one major weakness”, by Escalation Consultants (“Retroactivity

in railroads' fuel reporting requirements is necessary to ensure that railroads charges for fuel more accurately reflect their change in cost of fuel"). If such an undertaking is not made, the railroads could, for example, adopt a new methodology not addressed by the Board, such as rebasing the base rates without removing the fuel cost over-recovery.

As Entergy previous stated, the Board has clear authority to obtain the data it needs under 49 U.S.C. § 721(B).⁵ Thus, Entergy believes the Board has the requisite power to use existing or add regulations to require any reporting needed to assure that over recovery is not occurring on a permanent basis from fuel surcharges.

IV. Conclusion

Entergy supports the Board's proposed actions on fuel surcharges and urges the Board to adopt those proposals along with the recommendations made above by Entergy.

⁵ 49 U.S.C. § 721 (b) (2006). Railroads already provide certain fuel cost data to the STB on a quarterly basis through the RCAF process. 49 U.S.C. § 10708. In addition, the Board also requires railroads to submit certain cost and revenue data under 49 CFR Parts 1200 through 1300. Furthermore, railroads are required to report certain information regarding carrier rates and service terms pursuant to 49 CFR Parts 1300 through 1332.

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