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April 4, 2007

## VIA HAND DELIVERY

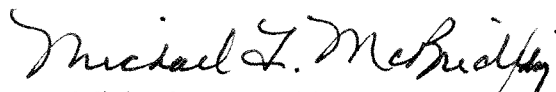
Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

Re: STB Ex Parte No. 671 – Rail Capacity and Infrastructure Requirements

Dear Mr. Williams:

In accordance with the Board's Decision issued March 6, 2007, in the above-referenced proceeding, enclosed for filing are the original and ten copies of the Written Testimony on behalf of Edison Electric Institute.

Respectfully submitted,

  
Michael F. McBride

*Attorney for Edison Electric Institute*

Enclosure

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 671**

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**RAIL CAPACITY AND INFRASTRUCTURE REQUIREMENTS**

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**STATEMENT**

**OF**

**William M. Mohl**

**Vice President, Commercial Operations**

**Entergy Services, Inc.**

**On Behalf of the**

**Edison Electric Institute**

## **I. INTRODUCTION**

On behalf of the Edison Electric Institute (“EEI”), its members, Entergy Services Inc. and the Entergy operating companies (collectively “Entergy”), I would like to thank the Board for taking the time to provide shippers with the opportunity to address concerns relating to railroad infrastructure issues, particularly as they relate to electric utility shippers. As you are aware, the Edison Electric Institute (EEI) is the association of U.S. shareholder-owned electric companies whose members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the U.S. electric power industry.

Entergy owns and operates 5 coal fired generating units through its operating companies Entergy Arkansas, Inc. and Entergy Gulf States, Inc. These coal units which total 3,887 MW of generating capacity, include the White Bluff and Independence Stations in Arkansas, and the Nelson Station in Louisiana. Entergy ships approximately 15 million tons/year of coal from the Powder River Basin of Wyoming to these coal-fired generating facilities. All of these units were originally designed to burn, and, with the exception of small test burns of lignite and petcoke respectively, until 2005 did in fact burn, 100 percent PRB coal.

I would like to say at the outset that EEI and Entergy recognize that the railroads’ investments and growth in the PRB and other selected portions of their systems have been impressive. If those improvements were fully reflected in deliveries to their utility customers, we would not be here today expressing our concerns to the Board and could better focus our efforts elsewhere. However, the Utility industry does have serious concerns that what the railroads are proclaiming as a dramatic recovery from, and cure of, their energy-related service woes of 2005 leaves untold certain infrastructure weaknesses and vulnerabilities which continue

to leave America's energy sector—and the U.S. economy—at substantial risk of further coal delivery disruptions. As I will explain more fully to the Board in the following comments, these concerns fall roughly in three general areas: (1) Overall averages and investment numbers being proclaimed by the railroad industry do not necessarily reflect—or insure—service improvements to all regions, any more than new utility generating stations insure adequacy of the intricate transmission and distribution systems needed to deliver the power to all utility customers; (2) Increased coal tonnages being publicized by the railroads—generally as compared to the disastrous year of 2005—do not necessarily mean that all requirements are being met; and (3) much of the increased tonnages reported by the carriers in 2006 and 2007 are being achieved by adding more and more trainsets instead of improving train performance, i.e., velocity, through critical bottlenecks and hubs, thereby leaving the rail system terribly fragile and vulnerable to further disruptions related to increased congestion, new traffic, track maintenance schedules and such ordinary occurrences as weather events, derailments, etc.

## **II. RELIABLE RAIL SERVICE IS CRITICAL TO AMERICA'S ENERGY SECTOR**

Today coal provides approximately 50 percent of the fuel for the nation's electric generation and the Energy Information Administration (EIA) in its Annual Energy Outlook for 2007 projects coal production, primarily for use in the production of electricity to increase between 1.1% and 1.8 % until the year 2030 – that is, assuming sufficient transportation exists to deliver the increased demand. Approximately 40 percent of that coal comes from the Powder River Basin (PRB) coalfields. EIA is forecasting that western coal demand/production, most of it PRB coal, is expected to grow at an annual rate of 2.5% (2005-2030). That means that about 20 percent of the electricity consumed in the United States is generated using PRB coal, more than the amount using natural gas.

There is only one mode of transportation practically available for PRB or other Western-originated coal – rail. Specifically, all of the Entergy-operated coal units are served directly by railroad and have historically received virtually all of the coal we burn via railroad. In addition to the PRB coal, much of the Appalachian coal as well as some amounts of lignite rely on rail shipment and/or delivery. Not surprisingly, this means that a large portion of the US generation capacity is directly dependent on the railroads' performance for their capability to generate electricity.

While much of the focus in recent years has been on the operations of the PRB Joint Line<sup>1</sup>, the energy industry is dependent on much more than just a well- functioning Joint Line. Like a spider web with Wyoming at its center, the transport of PRB coal frequently takes the coal more than 1,000 miles from the mines before it reaches its final destination east, west, and south of the PRB. During the trip, the train is dependent on high fluidity of the system, and smooth sailing through the major railroad gateways such as Kansas City, St Louis or Chicago. These gateways have seen an increase of all types of traffic, including intermodal, automotive, grain and coal, in recent years and are becoming increasingly congested. Even worse, gateway congestion and reduction in fluidity may be the result if this year's corn planting is reflected in the upcoming harvest. Reuters reported on March 30<sup>2</sup> that the 2007 planting of corn is the largest in 63 years, up about 6% over the record season of 2004. This could yield an unusually large harvest for the rails to move to consumer markets and ethanol plants, simultaneously with the influx of imported goods in preparation for the year-end shopping season. This congestion

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<sup>1</sup> Currently, BNSF and UP are the only two railroads providing coal transportation out of the PRB. Most of this coal is transported over a line of railroad that the two carriers jointly own that is commonly referred to as the "Joint Line." The Joint Line is a north-south rail line that spans approximately 120 miles. The Joint Line begins in the south at a junction between the BNSF and the UP networks called Shawnee Junction, Wyoming and extends north to the northern-most mine served by the Joint Line, Caballo Mine a short distance south of Gillette, Wyoming.

<sup>2</sup> March 30, 2007: "U.S. Farmers aim for record corn crop, ethanol riches", Reuters

can also be attributed to industry consolidation as the result of prior railroad mergers and acquisitions, which closed and abandoned duplicate train yards and trackage.

Additionally, fluidity of the rail system is dependent on sufficiently sized rail yards, interchange facilities, locomotive and crew availability. If any of these factors is not properly planned for and provided, it could seriously threaten the ability of the electric sector to reliably produce electricity for the US economy, at competitive prices. A less-than-well-functioning rail road system thus could lead to higher electricity prices for the US economy, and a less competitive US industrial sector.

From the mid-1980s until early 2004, BNSF and UP competed vigorously for the right to transport PRB coal tonnages. Coal shipments originating on the major line coming out of the PRB have grown from approximately 75 million tons in 1984 to over 350 million tons in 2006. While both BNSF and UP have invested capital into the Joint Line to facilitate this growth, the electric industry has also played an important role in the development of the PRB transportation system. In addition to paying the railroads' costs of providing service through the rates charged for rail transportation, utilities have directly paid the costs associated with transporting coal through a variety of initiatives, including but by no means limited to: investment in track and highly-specialized train handling facilities at the generating stations (or, in some cases, at rail-to-barge transfer facilities); investment in large fleets of tens of thousands of railcars; plant improvements that facilitated the use of longer trains (e.g., expanded loop tracks) so as to enable more tonnage to be delivered per train; and the construction of car repair shops (or contracting with private car repair shops) in which to maintain and repair these fleets of cars. The electric industry also entered into long-term contracts to provide the western railroads with contract certainty so that they could make the necessary investments in roadbed, locomotives and

manpower. All of these actions helped reduce the capital and operating costs of the railroads, with the overarching purpose of ensuring that utilities and their electric customers could count on reliable deliveries of coal to their power plants.

Even with these investments, the railroads' service levels on the Joint Line have been deteriorating since late 2004. While much has been made of the alleged weather events in 2005, it seems clear that the railroads were starting to fall behind on their deliveries to the electric utility industry by the fourth quarter of 2004. Although this point of view has not been as publicly debated, looking back, it indicates that the railroads were already entering a period where they were unable to deliver coal at the levels called for by their customers.

The rail service deterioration in the PRB in 2005 is well documented and need not be recounted in detail here. Suffice it to say, however, that Entergy received only about 85 percent of its contract nominated requirements for the year 2005, equating to a shortfall well in excess of two million tons. The cost of replacing this shortfall with alternate energy sources has been estimated to be in the tens of millions of dollars even though coal supplies were abundant in the PRB itself.

Governmental and private forecasts continue to project PRB coal traffic growth well into the future. For example, according to the consulting firm Energy Ventures Analysis, Inc., approximately 3,000-4,000 MW of PRB-coal fired generation will be constructed annually through 2013, which will lead to an increased demand for PRB-coal of about 12-16 million tons per year. Most of this growth is expected to come in markets far from the PRB, such as Texas (even despite TXU's announcement to cancel several new coal plants using PRB coal) and Florida. These plants will add a considerable amount of ton-miles to the railroads' service obligation, to locations that already today have significant delivery problems. For these reasons,

the electric utility industry has strongly supported the Dakota, Minnesota and Eastern Railroad's efforts to obtain government approval for its new line into the PRB, and we compliment the Board for its actions with respect to that Project.

### **III. RAILROAD INFRASTRUCTURE ADEQUACY REMAINS A CONCERN DESPITE IMPROVEMENTS IN THE PRB.**

A recent industry publication quoted a representative from BNSF saying that BNSF "believes 'there is sufficient capacity on the Joint Line to accommodate the needs of existing customers as well as new customers who recognize the value of PRB coal delivered to their facilities.'" In addition, the article goes on to state that "BNSF reviews demand and adjusts capacity expansion plans as appropriate to make sure that there is sufficient capacity on the Joint Line to meet the demand." However, the Joint Line capacity is only one of many factors that influence the railroads' ability to deliver on their contract commitments. It is well known, for example, intermodal traffic growth is highly prized and prioritized by the railroads. However, even in the coal sector alone, public data indicates that railroad decisions relating to performance and service during and after 2005 were not always as evenly allocated as they would like the public to believe. For example, in mid-2006 when the railroads were publicly proclaiming their recovery from the 2005 service disruptions, actual service to different regions varied greatly. Although some regions were experiencing year-to-date PRB-shipments at levels of 10-20% over 2005 volumes, other regions were seeing much smaller improvements and in some cases even LESS than the 2005 volumes—not to mention 2004 service-levels which for some utilities were still not matched even for 2006 end-of-year numbers. One prime example is the rail deliveries to the Nelson plant, unit 6 in Lake Charles, LA. Deliveries to this plant are dependent on rail shipments through Kansas City or through Texas, usually through both the Dallas-Fort Worth and the Houston metroplexes. During the course of 2006, these deliveries had cycle-times well

above (i.e., worse than) the contractual commitment levels and historical performance prior to 2005.

The railroads have made attempts to try to identify other solutions such as re-routing trains, and optimizing slotting procedures at the mines and the plant, but these efforts have not been sufficient to offset the overall slow-down in deliveries. Nothing suggests that Nelson is an isolated case. On the contrary, there are multiple power plants in some regions where overall traffic (including intermodal, grain, automotive, coal, etc.) in the surrounding areas have increased and the railroads' service levels have deteriorated to a point where they are not reliably and consistently delivering the contracted amounts of coal that are critical to keeping today's efficient and economic coal-fired generating units running at full capacity. Despite BNSF's recent claims that there is adequate capacity to meet its customers' needs as detailed above, Entergy received only about 86 percent of its overall nominated requirements for the Nelson plant during 2006, and is still experiencing difficulties due to bottlenecks across the system in 2007. It is our understanding that certain other shippers are also still experiencing similar shortfalls.

Although in early 2007 utilities are finally seeing some signs of recovery by the railroads in certain regions, concerns remain that the system is extremely fragile and unable to absorb and recover from shortfalls resulting from normal operating disruptions, track maintenance schedules, etc. This is evidenced by the fact that much of the increase in deliveries to our Nelson and Arkansas plants has been achieved by adding more train sets to these services instead of restoring train cycle times, i.e., velocity, to the contract standards agreed to by the carriers. While the added train sets deliver much-needed tonnage, the appearance of recovery is somewhat illusory because the need for these additional sets indicates that the rail system has not fully

recovered. If the past is any indicator, when the next disruption occurs, these additional sets will be the first ones parked. Further, with both UP and BNSF again in the market for additional coal business out of the PRB, we are concerned that the loading slots used for these additional train sets will be used for newer, more profitable shipping arrangements that are subject to railroad circular pricing with the associated surcharges for fuel, etc.

Accordingly, like any prudent utility with an obligation to serve its electricity customers, Entergy finds itself compelled to continue to purchase a certain amount of coal from alternate sources in order to ensure a reliable supply of coal to maximize the output of its base load coal fired generating facilities. During 2006, for example, Entergy had to purchase more than 950,000 tons of coal from alternate domestic and foreign sources, at a delivered cost of approximately 2-3 times that of PRB coal, to make-up for shortfalls in PRB deliveries. These purchases are continuing into 2007 and will continue indefinitely until the railroads can demonstrate that they have the capability to perform reliably at the service and delivery levels specified in our coal transportation agreements. In addition, Entergy is considering spending millions of dollars in capital investment to accommodate the burning of higher-cost alternative fuels, including foreign coals from places such as Indonesia and Columbia - a strange irony considering that America is frequently referred to as the "Saudi Arabia of Coal".

It is also important to note that it is not feasible or prudent for Entergy or other utilities to shut down their supply of supplemental coal whenever short-term delivery recoveries occur that may be short-lived. This is because the development of reliable alternate supplies requires several months or even years to locate suitable coals and sources, test and ensure compliance with ever-tightening environmental regulations affecting not only combustion emissions but every step of the delivery and handling process, develop contracts and gear-up the entire

production, transportation, delivery and handling process from mine to boiler. None of this supplemental coal, however, would be necessary but for the railroads' choices to limit the amount of coal they are delivering to their coal shippers. Regrettably, rail service has deteriorated to levels where shippers, like Entergy, cannot count on the railroads' commitment to deliver in accordance with contract commitments. Faced with the Hobson's choice of spending more for coal from alternate sources, or taking the risk that the railroads will limit deliveries notwithstanding the contract requirements, Entergy has looked to alternate sources. Further complicating such efforts, however, is that the railroads face challenges in many of these other regions as well. However, the acquisition of supplemental coal supplies obviously comes at a cost. The volume of supplemental coal needed, and the costs thereof which the utility customers will ultimately bear, will depend largely on the degree to which this Board and the railroad industry regain market confidence in their ability to meet future requirements for coal-fired electricity generation.

Developing infrastructure and competitive options are not only limited to generators relying on PRB-coal, but are also issues for generators relying on Appalachian coal sources. One prime example of that is a generating station that helps to provide power to the Washington, D.C. metropolitan region. In recent days there have been published press reports about the Mirant Corporation adding a barge-unloading terminal at the Morgantown Station on the lower Potomac River with the capability of bringing additional amounts of imported coal into the U.S. market.

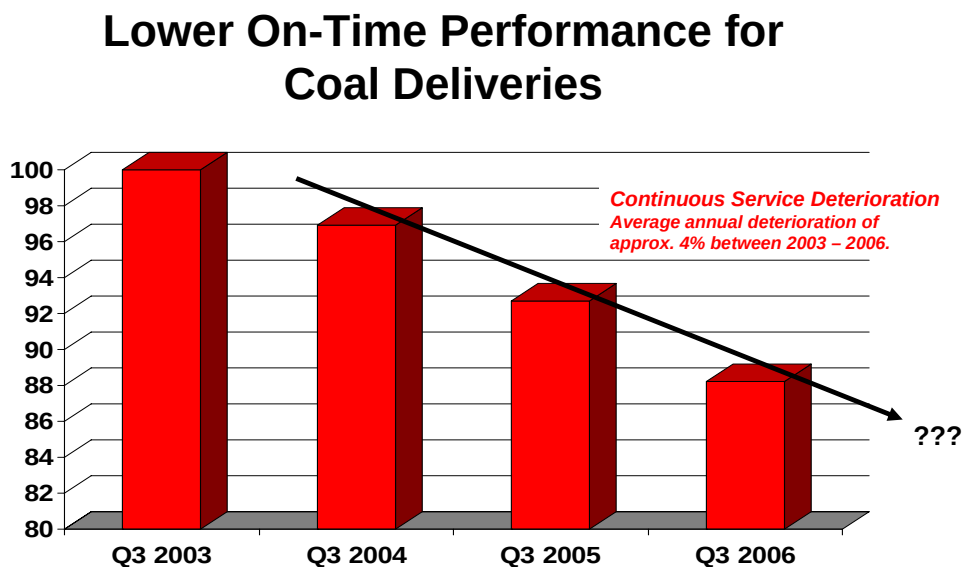
#### **IV. LACK OF EFFECTIVE COMPETITION HAS CREATED CONTINUED SERVICE PROBLEMS AS WELL AS MONOPOLY/DUOPOLY SITUATION AND PROVIDES RAILROADS MARKET POWER**

The PRB rail transportation market has changed substantially over the last few years due to inadequate investment by the railroads in a timely manner, maintenance problems, service failures, a lack of competition and the resulting market power enjoyed by the railroads.

While the railroads have frequently touted their increased investments and capital expenditures to their customers and investors over the last few years, they fail to mention the fact that the combined capital expenditure spending for UP and BNSF declined approximately 8% annually from 1998 through 2002. That means that despite the recent increases in UP's and BNSF's combined capital expenditures, they are just now catching up to the level they were at in 1998, and that is before taking inflation into account!

Another tangible indicator that there is good cause for concern about railroad reliability is the railroads' vastly increased reliance on Force Majeure claims to relieve them of responsibility to make-up for deliveries lost that were allegedly due to derailments and other relatively "common" occurrences. Prior to 2005, railroads only declared Force Majeure for truly extraordinary occurrences, such as prolonged floods or unusually severe winter storms. Entergy received more Force Majeure notices from its carriers during 2005 and 2006 than it had for the previous 20 years combined. The railroads' continued elevated use of Force Majeure in 2007 suggests that they still lack the ability to make-up for shortfalls resulting from fairly ordinary contingencies such as derailments or bad weather. Further, the lack of effective competition in the marketplace reduces the incentive and internal discipline needed by the carriers to perform at utmost efficiency.

As indicated in the graph below, there has been a steady decline in on-time performance for coal deliveries since Q3 2003:



As reported in BNSF Third Quarter 2006 Financial Presentation dated October 24, 2006 –  
Bnsf.com/investors/presentation/pdf/3Q\_2006\_Presentation\_Color.pdf - Page 31

Further evidence that utilities have no cause for optimism concerning sustained service improvements is the fact that the railroads are now unwilling to accept responsibility for guaranteed performance at any meaningful level. In general, the service performance standards in rail contracts have deteriorated substantially over time as the railroads have gained more market power and as competition has deteriorated<sup>3</sup>. In 2004, when Entergy requested proposals from the railroads for service to the Nelson plant, the railroads responded with proposals which were significantly inferior in terms of service guarantees to prior contracts but were priced at higher rates including a fuel surcharge. During negotiations, BNSF was unwilling to improve on the service guarantees and Entergy was essentially left with a “take it or leave it” contract. UP simply referred Entergy to their Circular 111 tariff, described below.

<sup>3</sup> Of course, as recent years have demonstrated, having a contract service standard has been of little benefit given the railroads view that they will treat all trains “the same,” regardless of what the contract service standard says. Thus, even with a contract service standard, reliability of service is a serious concern.

Both PRB railroads now publish standard pricing documents *i.e.* standardized tariffs, with volume commitments for up to 3 years in duration, whereas previously longer-term contracts were more common. These pricing documents contain very limited service obligations.

- UP's Circular 111 contains a provision requiring that all shortfall tons have to be mutually agreed upon in writing, and they will have 90 days after the agreement to mitigate the shortfall. If they still fail to deliver the shortfall, the railroad will compensate the shipper with \$3/ton, or less than \$2/MWh of lost generation. *(Keep in mind that \$2/MWh is nowhere close to the costs of the required replacement energy or fuel and provides the railroad with no meaningful incentive to meet its service commitment.)*
- BNSF's Pricing Authority 90068 goes further and states: "Until further notice, service commitments previously offered under this subsection will not be accepted."

The railroads now have a very strong market position in which they are in a position to dictate contractual terms unilaterally on a "take it or leave it" basis. As a direct result, utilities must not only consider alternative fuel supplies but they may also be forced to make additional investment in extra train sets in order to try to meet their delivery requirements. With no meaningful cycle time obligations provided by the railroads, utilities may now be forced to add additional train set capacity in order to achieve required inventory levels.

The Staggers Rail Act of 1980, which was intended to replace government regulation wherever possible with the powers of competition, granted railroads greatly increased commercial freedom, and granted the STB authority to monitor performance and set maximum rates while minimizing federal regulatory control. It is important to note that in 1980, there were over 70 Class I railroads, whereas over the last 25 years, the nation's major railroads have consolidated to the point that only four major railroads now provide 95% of all freight rail transportation in America and only two of those railroads serve the Powder River Basin.

While the Staggers Act may have originally promoted competition and been considered a success at some point in time, it is clear from a shipper's standpoint that the consolidation of the Class 1 carriers has gone too far and resulted in anything but a competitive marketplace. Merriam-Webster defines competition in business as "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms." The current situation in the PRB regarding rail service is anything but competitive as evidenced by the increased pricing and severe deterioration of service levels experienced by shippers in recent years.

In addition to the above concerns regarding service reliability, the following practices imposed by the railroads are clearly inconsistent with a competitive marketplace:

- *The Bottleneck Problem*

Under current deregulation policy, when a railroad controls a bottleneck line segment (a line owned by a single carrier that serves a particular origin or destination), it is not required to provide the rail customer with a rate for transportation over that segment to a point where the rail customer can reach a competing railroad. Instead the railroad has the ability to hold that shipper captive and subject it to "take it or leave it" rates and service guarantees.

- *Paper Barriers*

The Staggers Rail Act led to the formation of hundreds of short line railroads that operate track formerly run by a major railroad. Paper barriers are provisions in lease agreements

for this track that effectively prevent the short line railroad from providing rail customers access to competing major railroads once again creating a non-competitive situation.

**V. RAILROADS AND UTILITIES – SIMILAR YET VERY DIFFERENT IN TERMS OF ACCOUNTABILITY AND OBLIGATION TO SERVE**

- Railroads and electric utilities are very similar in that both are absolutely critical to meeting the nation's energy supply requirements, in addition to the following: Both require large capital investment for necessary infrastructure
- Both typically have large service territories with limited competition in certain regions and often operate as monopolies
- Both are impacted by U.S. economy and have experienced substantial demand growth over the last ten years
- The barriers to entry for both electric utilities and railroads are substantial from a financial investment perspective

However, there are also some very distinct differences between railroads and electric utilities:

- Electric utilities have an obligation to serve their customers whereas the railroads have no service obligations other than those they unilaterally determine or that are subject to private contractual agreement. (Can you imagine what would happen if an electric utility decided to serve its customers only 85% of the time?)
- Electric utilities are required to maintain adequate reserves or excess capacity to allow for maintenance, forced outages, etc. whereas the railroads have no

obligation to maintain reserve capacity and in fact have professed a “just in time” investment strategy to ensure that excess capacity does not exist.

- Electric utilities are required to provide for/allow interconnection or access to their bulk transmission system to accommodate new generating facilities or wholesale power transactions whereas railroads can and do refuse to allow interconnections or access to their rail systems
- Electric utilities are effectively regulated by both state and federal regulatory agencies in terms of both rates and service requirements whereas the railroads are not held accountable by any state or federal regulatory agency as it relates to rates or service requirements
- Electric utilities are subject to U.S. anti-trust laws whereas the railroads are exempt from the U.S. anti-trust laws leaving customers no forum in which to effectively resolve their claims of anti-competitive behavior
- Electric utilities typically have an “authorized rate of return” which limits their return on investment whereas the railroads have no limits on the rate of return they are allowed

The simple takeaway from this comparison is that the overall business model with the railroads is flawed and inconsistent with any other similar business model. The Board needs to revisit this model, especially in light of the critical nature of the service railroads provide to utilities and the U.S. economy.

## **VII. RAIL SERVICE CONTINGENT UPON CONTINUED CONTRIBUTION TO APPROPRIATE RAIL INFRASTRUCTURE**

The current challenges facing the railroads with respect to infrastructure expansion should not become a justification for diminishing or eliminating the railroads' fundamental obligation to provide service upon reasonable request, presently codified at 49 U.S.C. § 11101, which includes a requirement on the part of the railroads to construct and maintain sufficient infrastructure to meet their common carrier obligations. This principle is particularly relevant to this proceeding because it is well-established that a railroad cannot make a shipper's commitment to directly contribute money for the construction or repair of the railroad's infrastructure a condition precedent for the provision of providing rail rates and rail service. As the Board has recently explained, "A rail carrier cannot make its service contingent upon guaranteed profits from that service or upon the shipper's advance funding of repairs to the rail line over which the service would then be provided."<sup>4</sup> Rather, a shipper can either negotiate a fair direct contribution under the circumstances, or refuse the railroad's request, in which case the railroad must factor its recovery of any necessary capital investment into its response, subject ultimately to the requirement that the rates and service terms be reasonable. The reasons for such a rule are obvious. Without such protections, railroads would be free to exploit their customers, in particular customers without access to another railroad, for not only significant payments before the transportation even began, but also contributions in excess of the capital costs that should be appropriately allocated to that particular traffic. Such "double dipping" is no different conceptually from the "double-dipping" the Board recently held unlawful with respect to rail fuel surcharges.<sup>5</sup>

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<sup>4</sup> STB Finance Docket No. 33989, *Pejepscot Industrial Park—Petition for Declaratory Order*, 2003 STB Lexis 253 at \*28 (Served May 15, 2003).

<sup>5</sup> STB Ex Parte No. 661, *Rail Fuel Surcharges*, 2007 STB Lexis 39 (Served Jan. 26, 2007)

The present lack of competition in the rail industry has led to an erosion of this important protection. EEI's members increasingly report that certain Class I railroads are demanding that shippers agree to pay for substantial infrastructure improvements identified by the railroad as a condition for discussing or providing rates and service terms, forcing the shipper to either accede to extremely onerous out of pocket expenses before the transportation even begins, or to consider formal action to prevent such behavior before this Board. Neither of these options is palatable or desired. The Board should head off such practices by the railroads by emphatically rejecting in this proceeding any effort to erode or eliminate the established ability of a shipper to refuse to pay for railroad infrastructure improvements as a condition for a response to a request for rates and service terms. There may be instances where such contributions are mutually agreeable and appropriate. However, EEI believes that it would be wholly inappropriate for the Board to entertain solutions to the railroads' capacity and infrastructure challenges that that would alter the railroads' common carrier responsibilities or involve compulsory infrastructure premiums paid by shippers.

EEI believes that railroads must remain accountable to the shipping public, regardless of their capacity and infrastructure challenges, and the Board is responsible for seeing this happens. Thus, while the Board should use this proceeding to explore solutions to rail infrastructure and capacity problems, it should vigilantly enforce the common carrier obligation and related sections of Title 49 of the U.S. Code to ensure that railroads do not attempt to solve their problems by engaging in unlawful or unreasonable practices.

## **VII. CONCLUSIONS AND RECOMMENDATIONS**

It has become painfully obvious to many utility shippers that the current situation with the railroads is simply out of hand and there is little chance for improvement without the

intervention of the Board and or other legislative changes to proactively address the issues addressed herein. While the railroads have indicated that they are now making significant investment in infrastructure and everything is going to go back to normal, the fact remains that significant service problems and market-dominant pricing issues continue for many shippers and these concerns are not being effectively addressed. Further exacerbating this problem is the fact that the railroads clearly have established market power over major portions of their systems and the lack of competition that exists due to certain destinations being captive due to single source rail providers, or various practices imposed by the railroads (bottleneck issue, paper barrier issue, etc.) which effectively eliminate competition. As indicated herein, railroads are similar to utilities in many aspects including the important fact that they maintain monopoly power in certain regions; however, with that monopoly power there currently is no accountability for the railroads and shippers have nowhere to turn to have their issues appropriately addressed. In consideration of the critical nature of coal deliveries to meet the nations electric needs, it is imperative that railroads be required to build appropriate infrastructure to competitively and reliably serve the needs of utilities both now and in the future at reasonable rates and with reasonable service guarantees and appropriate oversight.

We believe the Board has the authority to ensure that railroads are meeting their common carrier obligations to serve their customers and have adequate infrastructure in place to meet this requirement. In an effort to gain a clearer understanding and better address these issues, we are requesting that the Board immediately implement the following practices:

- Require detailed reporting from the railroads as described below:
  - a. Energy-related service levels vs. demand. A practical example would be to compare total monthly PRB joint line shipments against web-based monthly forecasting data compiled by the BNSF and UP for their PRB Joint Line

customers. This comparison provides a useful measuring stick of overall railroad performance in the PRB while protecting confidentiality of individual carriers and shippers.

- b. Expand current STB railroad velocity reporting requirements to reflect primary commodity groups by corridor. While not a perfect measure of overall throughput, this data could provide a more useful measuring stick of rail performance by major commodity group, such as energy/coal, than current system-wide velocity numbers.
- c. Railroad Force Majeure claims by region. These claims reflect events that impede performance by the carriers, e.g., derailments, floods, severe weather, etc.
- d. Railroad capital investment by major commodity group by region. The report prepared by FERC's Office of Energy Projects that reports on number of miles and BCF/D throughput of natural gas pipeline construction, major pipeline projects certificated and pending, and LNG projects could provide a useful template for analysis of railroad capital investment by the Board.

- Initiate investigations into certain regions of the country where market abuse by the railroads is evident. As you are aware, the Government Accountability Office ("GAO") report dated October 2006 found that "Concerns about competition and captivity (in the rail industry) remain as traffic is concentrated in fewer railroads."<sup>6</sup> The report further found that the STB is not ensuring competition in the rail industry and made the following recommendation:

"We believe that an analysis of the state of competition and the possible abuse of market power, along with the range of options STB has to address competition issues, could more directly further

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<sup>6</sup> An excerpt of the GAO Report is attached as Exhibit WMM-R-4. The full report may be located at [www.gao.gov](http://www.gao.gov).

the legislatively defined goal of ensuring effective competition among rail carriers.” (GAO Report, Page 6)

- Commit to provide a detailed report to the Congress regarding the “State of the Railroad Industry” by no later than December 2007, to address rail competition and the service and pricing practices of the Class I railroads, as well as any inadequacies in railroad infrastructure and capacity.

\* \* \*

Thank you again for your careful consideration of these important issues.