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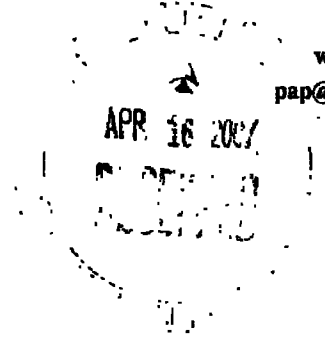
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April 16, 2007



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Attn: STB Ex Parte No. 670
395 E Street, SW
Washington, D.C. 20423-0001

Re: Ex Parte No. 670, *Establishment of the Rail
Energy Transportation Advisory Committee*

Dear Secretary Williams:

Please find an original and ten (10) copies of the Comments of the Western Coal Traffic League in the above-referenced proceeding.

We have enclosed an additional copy of these Comments. Please indicate receipt and filing by time-stamping this copy and returning it with our messenger.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Pfohl".
Peter A. Pfohl
An Attorney for the Western
Coal Traffic League

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

APR 16 2007

ESTABLISHMENT OF THE	)	
RAIL ENERGY	)	
TRANSPORTATION ADVISORY	)	
COMMITTEE	)	

Ex Parte No. 670-

**COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE**

Of Counsel:

**Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036**

Dated: April 16, 2007

**By: William L. Slover
Christopher A. Mills
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036**

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ESTABLISHMENT OF THE	)	
RAIL ENERGY	)	
TRANSPORTATION ADVISORY	)	
COMMITTEE	)	

APR 16 2007
RECEIVED
Ex Parte No. 670-11110

**COMMENTS OF THE
WESTERN COAL TRAFFIC LEAGUE**

These comments are submitted by the Western Coal Traffic League ("WCTL") in response to the Board's Notice served on March 9, 2007 in the above-referenced proceeding with respect to the desirability of establishing a Rail Energy Transportation Advisory Committee ("RETAC").

IDENTITY AND INTEREST

WCTL is an association formed in 1976 whose membership is composed of shippers, receivers, and consumers of coal mined from sources west of the Mississippi River. WCTL members collectively consume more than 140 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, rural electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.¹

¹ WCTL's Members are: Alliant Energy; Ameren Energy Fuels and Services; Arizona Electric Power Cooperative, Inc.; Arizona Public Service; CLECO Corporation; City of Austin, Texas; CPS Energy; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska

All WCTL members rely on the efficient and reliable movement of coal by rail as a critical component of electric system reliability. Accordingly, the possible establishment of a committee to provide independent advice and policy suggestions to the Board on rail reliability issues is of considerable interest to WCTL.

I.

COMMENTS

The Board's Notice states that, if established, RETAC would be used "to provide independent advice and policy suggestions to the Board on issues related to the reliability of rail transportation of resources critical to the nation's energy supply," including coal. March 9, 2007 Notice at 1. The Board is seeking comments on three areas: (1) the potential utility of such a committee; (2) the appropriate scope of the committee's mandate; and (3) the optimum make-up and size of the committee. WCTL is pleased that the Board is interested in becoming further engaged in matters relating to improving rail energy transportation reliability through the possible establishment of RETAC, and it is pleased to provide these comments in response to the Board's Notice.

Public Power District; Omaha Public Power District; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; Wisconsin Public Service Corporation; and Xcel Energy.

A. The Utility of Establishing the RETAC

1. The Need for the Establishment of the RETAC

a. The Board's Role in Ensuring Coal Transportation Reliability

WCTL fully agrees with the Board that it has a responsibility to ensure the efficient transportation of energy supplies. Coal is by far the most abundant and important energy commodity moved by rail. Approximately one-half of the Nation's electricity is derived from coal-fired generation and this situation will not change in the foreseeable future. Most coal used as fuel for electric generation moves exclusively by rail. Predictable and reliable coal transportation service is essential to electric system reliability and the fulfillment of U.S. national energy policy.

The Board's authority to ensure the reliable transportation of coal is clear as part of the railroads' fundamental "common carrier obligation." See 49 U.S.C. § 11101(a) (requiring common carriers to provide service "on reasonable request"). Applicable STB precedents support the authority of the Board to enforce the duty of carriers under 49 U.S.C. § 11101 to provide adequate service on their lines. See Winnebago Farmers Elevator Co. v. Chicago & North Western Trans. Co., 354 I.C.C. 859 (1978) (ICC determined that a railroad's duty to furnish transportation upon reasonable request and adequate car service required railroad to upgrade its line and supply equipment and provide upgraded service). The STB has further concluded in cases where a carrier has refused to provide common carrier service that:

[carriers] cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is “worth it” to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing. . . . The only appropriate mechanisms a railroad may employ to excuse itself permanently or temporarily, from its common carrier obligations on a line of railroad are abandonment or embargo.

STB Finance Docket No. 33989, Pejepscot Industrial Park, Inc. D/B/A Grimmel

Industries -- Petition for Declaratory Order, (STB served May 9, 2003) 2003 WL

21108198 *6-*7.

Further, the Board’s jurisdiction over transportation of rail carriers and remedies with respect to rules, practices, services, routes, and facilities of such carriers is “exclusive,” and there is no other governmental entity capable of playing a direct role over rail transportation policies and programs affecting coal and other energy commodity deliveries. See 49 U.S.C. § 10501(b). Finally, Congressional guidance is clear that the Board should be actively ensuring the efficient, reliable, and affordable transportation of coal by rail:

[t]he conferees intend that (the Rail Transportation) policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objective of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.

Conference Report on the Staggers Rail Act of 1980, H.R. Rep. No. 96-1430 (1980) at 80.

b. The Railroads' Recurring Service Problems

WCTL will not repeat at length here the recurring rail service problems its members have experienced with the reliable movement of coal. These problems are well-known to the Board. Many of the service interruptions over the years have been closely related to railroad consolidations, although others were not merger-related. As even the Board itself has acknowledged:

In [recent] years, the railroad industry in the United States underwent several mergers involving the nation's largest railroads, with the result that now only four large railroads remain – two in the West and two in the East. Unfortunately, with those mergers came severe service disruptions that have cost shippers nationwide hundreds of millions of dollars in lost freight or delayed shipments, and, again unfortunately, many of those problems persist even to this day.

* * *

The well-publicized service crisis that developed shortly after approval of the UP/SP merger cost American business (including both railroads and their customers) hundreds of millions of dollars and crippled railroad activities throughout the United States for nearly a year. The subsequent service problems following the Conrail division “threatened to bring parts of rail service in the East to a standstill” and “cost corporate shippers millions [of dollars] in delays.” The problems with the BN/SF merger, while less publicized, were also substantial, even though, as pointed out by several shippers and shipper groups, . . . that merger was considered to be largely an “end to end” combination that presumably would not create such difficulties. And even the CN/IC merger . . . has not left all shippers satisfied.

Western Coal Traffic League v. STB, (D.C. Cir. No. 00-1115, et al.), STB Brief at 4, 10-

11 (footnotes omitted).

More recently in 2004-2006, the western railroads experienced significant service problems in delivering coal to their customers. Utility coal stockpiles dwindled and the carriers rationed service and curtailed new business. The Congress and Federal Energy Regulatory Commission held hearings in 2006 to address deficient railroad service and the impact of that service on electric system reliability.² Also, the National Energy Reliability Council examined and issued warnings about the situation,³ several state utility commissions explored the matter, and the national press widely reported on the substantial rail service problems and their impacts on the electricity generation reliability. It is widely known that these railroad service failures cost electric consumers hundreds of millions of dollars in added electric generation costs and caused severe system operational problems.

c. Recent Board Actions Relating to Recurring Service Problems

WCTL is pleased that the Board is now reviewing the important issue of rail energy service reliability and is considering the possible establishment of the RETAC.

Railroad energy service reliability clearly has not been a Board priority in the past. In recent years, beyond requiring the carriers to provide general annual “fall

² See Federal Energy Regulatory Commission Docket No. AD06-8-000, Discussions with Utility and Railroad Representatives on Market and Reliability Matters, June 15, 2006 Hearing; Hearing before the Committee on Energy and Natural Resources, U.S. Senate on Coal-Based Generation Reliability, S. Hrg. 109-601, May 25, 2006.

³ See 2006 Summer Assessment: Reliability of the Bulk Power System in North America, North American Electric Reliability Council, May 2006, at 5-6.

peak” season letters concerning their performance and expected performance, WCTL is unaware of any formal Board activity to monitor the service performance of the railroads, even in light of their recurring, widely publicized service problems.

In June 2005, WCTL wrote a detailed letter on this very subject to the Board Chairman. WCTL’s letter in particular discussed the critical problems that were confronting coal shippers with regard to poor rail service, the Board’s serious misunderstanding about the problems, and its failure to address the problems. That letter stated, in relevant part, as follows:

We are . . . concerned that the Board is unaware of the serious problems confronting coal shippers even in advance of the fall peak season.

Of particular concern is the claim in your June 15, 2005 letter that the railroads handled the demands of the 2004 fall peak season “without any significant degradation of system fluidity and performance.” That statement simply does not reflect the reality that coal shippers experienced. A number of League Members . . . suffered from impaired service in a variety of respects. Several members have had burnable stockpiles at power plants of ten days or less at times in the past year (and at least one is suffering from that condition currently). Some members have had their deliveries fall as much as 20% below targeted levels for all of 2004, and had even larger deficits in individual quarters. While the Board may not be aware, UP refused to allow coal shippers to bring additional trainsets onto its system last year, further confirming the impairment of fluidity and performance.

Members have tried to address the service problems in a variety of ways. Some Members have deferred dumper outages and altered schedules for planned outages in response to shortfalls in deliveries. A number of Members have also

curtailed their coal burns, which entails a particularly high cost given current natural gas prices.

...

The Board should understand that the problems have persisted into 2005 and have been exacerbated, even before we reach the fall season. For some Members, the railroads never fully recovered from the 2004 problems, even in the face of scheduled plant outages in the spring, and then recovery efforts were further undermined by the much-publicized derailments in the PRB. Just this week, the CEO of Arch Coal warned that some power plants could run out of coal this summer.

Letter from WCTL to the Honorable Roger Nober (dated June 24, 2005). (A complete copy of the letter is attached as Exhibit 1.) In its letter, WCTL also urged the Board to more closely monitor the situation and to require new railroad reporting in order to better evaluate the railroads' performance. Id. WCTL never received a response to this letter, and it is unaware of any specific follow-up actions taken by the Board on this matter or on the issue of energy service reliability in general, until the issuance of the Board's March 9, 2007 Notice in this proceeding.⁴

⁴ WCTL is aware that the Board requested and received another round of generic "fall peak" response letters from the railroads in the summer of 2006, but the Board's request did not specifically mention coal service reliability issues. WCTL is also aware that the STB's Office of Compliance may have been in informal contact with one or both Union Pacific Railroad Company and BNSF Railway Company during 2005-2006 on rail service matters generally.

**2. The Role that RETAC could Play in Helping
to Promote Energy Transportation Reliability**

The Board is seeking to establish the RETAC under the Federal Advisory Committee Act (“FACA”),⁵ a procedural statute that regulates the establishment and use of advisory committees by federal agencies. Under FACA’s governing rules, advisory committees are authorized to be established “only when it is essential to the conduct of agency business and when the information to be obtained is not already available through another advisory committee or source within the Federal Government.” 41 C.F.R. § 102-3.30(a).

FACA advisory committees are “advisory only” in nature. See 5 U.S.C. App. 2 at §2(b)(6). Therefore, the role for the RETAC would be to appropriately advise and provide policy and other suggestions to the Board on matters relating to rail energy reliability. The FACA rules further provide that, in determining whether an advisory committee is necessary, factors to be considered include: whether deliberation of such a committee could result in result in either the creation of regulations, policies or guidelines affecting agency business; whether the committee “will make recommendations resulting in significant improvements in service;” and whether a committee’s deliberations “will provide an important additional perspective or viewpoint affecting agency operations.” Id.

⁵ Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. 2).

WCTL believes that whether or not the establishment of the RETAC could have a positive contribution in the above areas is a question that is entirely dependent on how seriously the Board takes its responsibility to help ensure rail energy reliability. As stated above, WCTL strongly believes that the issue of furthering and supporting rail energy reliability is an essential component of the Board's responsibilities.

WCTL respectfully submits that, in order for such a committee to play an effective advisory role, the Board will need to ensure that a number of important organizational and other related matters are adequately considered and addressed up-front. Included among these are the following: ensuring the committee is comprised of a fair and balanced membership comprised of individuals that have a serious interest in furthering the goal of improved energy service reliability; ensuring that the Board actively engages the committee and solicits its input; ensuring that the committee has the necessary support and financial assistance (including the ability to engage experts, as appropriate, to conduct needed analyses) on what is clearly a complex and difficult issue; ensuring that the committee will have access to appropriate information related to rail energy reliability as necessary to be able to carry out its mandate (including, but not limited to, relevant railroad operating and performance information); ensuring the committee will have appropriate decisional independence and discretion to explore and address all appropriate matters related to energy service reliability; and ensuring that the Board will carefully review and consider advice and recommendations provided by the Committee.

B. The Scope of the Committee's Mandate

WCTL respectfully submits that the main focus of the RETAC, if established, should be on coal transportation reliability matters. Such a focus on coal transportation reliability is important for many reasons, including: the critical importance of efficient coal transportation service to electric system reliability, that nation's energy policy, and U.S. national security generally; the enormous volumes of coal that must be moved by rail that cannot be moved by other means (e.g., by truck, barge); and the widespread recurring service problems that the railroads have been experiencing specifically pertaining to coal transportation. WCTL further submits that if the mandate of the committee were substantially broadened to areas substantially beyond coal transportation reliability, the utility and effectiveness of the committee might be jeopardized.

C. The Optimum Make-Up and Size of the Committee

In establishing an advisory committee, governing law requires that the membership be "balanced." 49 C.F.R. § 102.3.30(c). The STB has stated in its Notice that the intent of establishing the RETAC is to "provide independent advice and policy suggestions to the Board on issues related to the reliability of rail transportation of resources critical to the nation's energy supply." March 9, 2007 Notice at 1. To achieve this balance, WCTL submits that appropriate committee representation should include coal transportation consumers, producers, and railroads.

From the utility side, the committee should be comprised of a diverse cross-section of investor-owned electric utilities, rural electric cooperatives, and public power

providers by geography and size.⁶ Both “captive” utility coal consumers and those with so-called “effective” competition (i.e., more than one railroad service provider option at destination) should be represented. Additionally, a geographically diverse cross-section of coal producers should be represented.⁷

It also would be appropriate for eastern and western representative(s) of the four major Class I coal hauling railroads, Union Pacific Railroad Company, BNSF Railway Company, CSX Transportation, Inc., and Norfolk Southern Railway Company, to participate. Additionally, the appointment of individuals from other governmental agencies (e.g., the Federal Energy Regulatory Commission, the U.S. Department of Energy, or the National Energy Reliability Council) who are knowledgeable about the importance of reliable transportation service to electric system reliability, and who may have relevant experience on reliability matters, may be appropriate.

Concerning overall membership numbers, WCTL does not believe the RETAC should be so large so as to compromise its utility and effectiveness. However,

⁶ Among those to be considered for membership should be consumers such as WCTL Member Western Fuels Association, Inc. (“Western Fuels”), a nonprofit corporation that obtains coal and coal transportation services for its members. Western Fuels also is a western coal supplier.

⁷ Because the majority of the Nation’s coal is produced in the western United States, and growth in western coal production is expected to continue to expand dramatically (while eastern coal production is expected to essentially remain flat), WCTL submits that the Board should allow for some additional committee participation from western coal consumers and producers (although WCTL recognizes that some producers and consumers operate and obtain coal in both regions of the country).

WCTL is less concerned about overall membership size than about ensuring that the committee is comprised of individual members that are seriously interested in carrying out the committee's mandate. Again, however, WCTL believes that any committee that would be established should primarily be focused on coal transportation reliability and that the membership should, accordingly, be principally comprised of individuals that are interested in that focus area.

CONCLUSION

WCTL greatly appreciates this opportunity to submit these comments, and it urges the Board to establish the RETAC in the manner discussed herein.

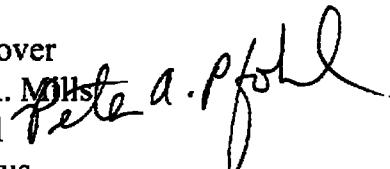
Respectfully submitted,

Western Coal Traffic League

Of Counsel:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: April 16, 2007

By: William L. Slover
Christopher A. Mills
Peter A. Pfohl 
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys & Practitioners



THE WESTERN COAL TRAFFIC LEAGUE

1224 Seventeenth Street, N.W.
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Officers

June 24, 2005

Mark W. Schwirtz
Arizona Electric Power Coop., Inc.
Benson, Arizona
President

Paul Freund
MidAmerican Energy Co.
Davenport, Iowa
Vice President

David Laffere
Kansas City Power & Light Co.
Kansas City, Missouri
Treasurer

The Honorable Roger Nober
Chairman
Surface Transportation Board
1925 K Street, N.W., Suite 810
Washington, D.C. 20423-0001

Dear Roger:

Executive Board

Arizona Electric Power Coop., Inc.
Benson, Arizona

MidAmerican Energy Co.
Davenport, Iowa

Kansas City Power & Light Co.
Kansas City, Missouri

City Public Service Board
San Antonio, Texas

Minnesota Power
Duluth, Minnesota

Omaha Public Power District
Omaha, Nebraska

Westar Energy
Topeka, Kansas

Lower Colorado River Authority
Austin, Texas

Xcel Energy
Minneapolis, Minnesota

The Western Coal Traffic League (WCTL) is pleased that the Board continues to take interest in the ability of the Class I railroads to meet customer needs, as reflected in your June 15, 2005 letters to the Chief Executive Officers of the Class I railroads. At the same time, WCTL is concerned that your description of the railroads' performance in 2004 seems inaccurate, at least for coal transportation. We are further concerned that the Board is unaware of the serious problems confronting coal shippers even in advance of the fall peak season.

Of particular concern is the claim in your June 15, 2005 letter that the railroads handled the demands of the 2004 fall peak season "without any significant degradation of system fluidity and performance." That statement simply does not reflect the reality that coal shippers experienced. A number of League Members, including, but hardly limited to, Arizona Electric Power Cooperative, Inc., suffered from impaired service in a variety of respects. Several members have had burnable stockpiles at power plants of ten days or less at times in the past year (and at least one is suffering from that condition currently). Some members had their deliveries fall as much as 20% below targeted levels for all of 2004, and had even larger deficits in individual quarters. While the Board may not be aware, UP refused to allow coal shippers to bring additional trainsets onto its system last year, further confirming the impairment of fluidity and performance.

Members have tried to address the service problems in a variety of ways. Some Members have deferred dumper outages and altered schedules for planned outages in response to shortfalls in deliveries. A number of Members have also curtailed their coal burns, which entails a particularly high cost given current natural gas prices.

The problems were not confined to the West, as coal shippers in the East are reported to have experienced similar or even more severe problems last year. It also does not appear that the problems were confined to coal, as evidenced by the backlogs at West Coast ports and the difficulties experienced by agricultural shippers.

Even the carriers have acknowledged their performance suffered during 2004 and that they were unable to meet customer needs. For example, UP's annual report admits that "we did not fully meet this demand as we experienced considerable operating difficulties." Similarly, CSX's annual report notes that "service related constraints" caused its volume growth to lag, especially within the coal and metals markets, resulting in traffic diversions. In view of such statements, we find it difficult to understand how it can be claimed that there was not significant degradation in railroad performance during 2004.

The Board should understand that the problems have persisted into 2005 and have been exacerbated, even before we reach the fall season. For some Members, the railroads never fully recovered from the 2004 problems, even in the face of scheduled plant outages in the spring, and then recovery efforts were further undermined by the much-publicized derailments in the PRB. Just this week, the CEO of Arch Coal warned that some power plants could run out of coal this summer.

WCTL urges the Board to monitor the industry's ability to serve the public, especially as a common carrier's most basic obligation is to serve the public upon reasonable request. The conclusion that the industry met this obligation without significant qualification in 2004 is simply not in accord with the reality experienced by coal and other shippers, nor does it reflect the statements by the carriers themselves noted above.

Perhaps the Board would have a better ability to evaluate the railroads' performance if it required reporting of relevant data, by category of traffic, for such items as (a) the number and volumes of deficits that arose under contracts, (b) the

The Honorable Roger Nober

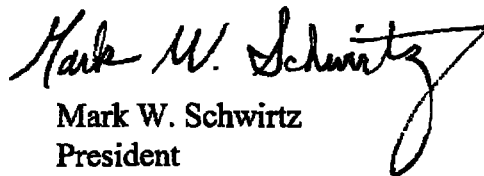
June 24, 2005

Page 3

volumes of other traffic that the carriers either directly refused or failed to transport as requested by rail shippers, (c) restrictions on utilization of shipper-provided equipment, and (d) the additional volumes that the railroads project would be available for transport if the industry did not face operational constraints. The Board, and even the carriers themselves, could devise further measures beyond average railroad operating speeds, dwell times, volumes delivered, and cars in service, which address railroad performance, but without regard to ultimate customer needs.

We greatly appreciate the Board's attention to this important matter.

Sincerely,

A handwritten signature in black ink, reading "Mark W. Schwirtz". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Mark W. Schwirtz
President

MWS:kfm

cc: Vice Chairman W. Douglas Buttrey
Commissioner Francis P. Mulvey